

CASES

ARGUED AND DETERMINED

11

THE SUPREME COURT

67

THE STATE OF MISSOURI.

JULY TERM, 1874, AT JEFFERSON CITY.

SAMUEL WORKMAN, Appellant, vs. COLLINS C. CAMPBELL, Respondent.

1. *Contract—Subscription, alteration of—Ratification.*—Where the amount of an original subscription was altered by a third party, a subsequent ratification would be equivalent to a previous authorization of the change.
2. *Subscription—Alteration—Consent—Burden of proof.*—In a suit on a contract of subscription, where the defense was an alteration without defendant's consent, of the amount subscribed, the *onus* would rest on plaintiff to prove that defendant placed opposite his name, or consented to have placed, the sum sued for.

Appeal from Johnson Circuit Court.

Crittenden & Cockrell, for Appellant.

Phillips & Vest, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

A statement of this case will be found in 46 Mo., 305 when it was reversed, having been decided in favor of the defendant upon demurrer, the court being of the opinion that if he had a defense it should have been taken by answer.

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When the case went back to the Circuit Court, the defendant filed his answer under oath, denying that he had executed the writing sued upon, stating that the original subscription was for fifty dollars, and that the sum of two hundred dollars for which the action was brought was not subscribed by him. He further alleges, that his name was obtained by false and fraudulent representation; that the subscription was for an illegal and corrupt purpose, and that there was a combination on the part of the plaintiff and others to cheat and defraud him. The case was submitted to the court without a jury, and after hearing the evidence a verdict was found for the defendant. There was evidence on each side tending to prove the issue presented, and therefore, the only question for us to determine, is, whether the court properly declared the law.

The first instruction asked by and given for the plaintiff, was in accordance with the law as laid down by this court when the case was here before. The second and third instructions were refused.

The second states that it is admitted, that the defendant signed his name for \$50 to the paper, and that the subscription shows \$200 opposite his name; and if the court believe from the weight of evidence that the defendant did subscribe opposite his name \$200; or if the court believe from the weight of evidence that defendant did not subscribe opposite his name \$200, but a less sum, and further believes that afterwards, said amount was raised to \$200 and that that fact was made known and stated to him, and that he was requested to pay that sum, and promised to pay it, then that was on his part a ratification of any alteration or change made and was binding upon him.

The third instruction declares, that defendant having signed his name to the subscription paper and there being placed opposite his name the sum of \$200, the presumption of law, is, that he placed said sum opposite to his name, and if that was not the true sum it devolved upon him to show to the satisfaction of the court, that an alteration was made

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without his consent, and that in considering the truthfulness of the subscription, the court should take into consideration the preponderance of the evidence, the circumstances under which it was made, the capacity of the defendant to make the subscription, and the interest he had in making it, etc.

At the instance of the defendant the court gave three instructions:

First—That it devolved upon the plaintiff, to prove that the defendant placed, opposite his name to the subscription, the figures, \$200, or that he authorized the same to be done, and unless he proves the same to the satisfaction of the court the verdict should be for the defendant.

Second—If the court believes from the evidence that after defendant signed the subscription, and placed a sum opposite his name, as the amount thereof, the amount was altered without his knowledge or consent, then plaintiff was not entitled to recover.

Third—Although the court should find from the evidence that defendant did place opposite his name on the subscription paper the figures \$200, and that the plaintiff did afterwards expend and pay out to the directors of the Pacific Railroad money in securing the location of the depot, on the land of the plaintiff, yet if the court finds from the evidence, that the plaintiff by himself or others, used such money to improperly influence the action of the directors of the road in locating the depot upon plaintiff's land instead of elsewhere, then the plaintiff cannot recover for his services or money thus employed or used.

The third instruction refused, was so palpably erroneous that it requires no argument to sustain the action of the court. The second was unhappily framed and obnoxious to criticism. There is no doubt that a subsequent ratification would have been equivalent to a previous authorization, in relation to changing the amount of the subscription. But this principle was fairly and clearly stated in the instruction of the defendant and that was sufficient. We see no objections to the instructions given for the defendant, when we consider that

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the signing was denied under oath ; and the case seems to have been fairly submitted.

Judgment affirmed ; the other judges concur.

DANIEL L. WELLS, et al., Respondents, *vs.* S. S. SHARP, et al.,
Appellants.

1. *Practice, civil—Allegata and probata—Variance, what not sufficient to invalidate verdict.*—In suit for the value of certain chattels where the petition charged a sale, whereas the evidence showed merely an agreement to return the same or corresponding articles, and a subsequent admission of indebtedness and promise to pay it; *held*, that such variance would not vitiate the verdict in the absence of proof that defendant was surprised or injured thereby. (See Wagn. Stat., 1033-4, §§ 1, 2.)
2. *Practice, civil—Variance—What remedy in case of.*—Where the variance between pleading and proof is material, the proper remedy is an affidavit filed with the trial court, setting forth the facts and an order directing an amendment upon terms.

Appeal from Jackson Circuit Court.

Karnes & Ess, for Appellants.

Wallace Pratt, for Respondents.

WAGNER, Judge, delivered the opinion of the court.

The petition alleged a sale and delivery of four carts, by the plaintiff, to a firm in which the defendant was one of the partners. The answer was simply a denial.

The case was submitted to the court without a jury, and plaintiff's testimony showed that the defendants received from plaintiff's four carts, which were valued at a certain price, and that in place of them the defendants were, on a certain day, to deliver plaintiff's four other carts of equal goodness in make and of equal value. This they did not do. Plaintiff's then presented their bill to the defendants for the value of the carts, which defendants agreed to pay, but not having done so, plaintiff's instituted this action. Defendants introduced no evidence. There was a judgment for plaintiff's.

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The only question presented for consideration, is the action of the court in refusing defendant's instruction, which was, that if the court, sitting as a jury, believed from the evidence that the plaintiffs delivered to defendants four carts, under an agreement that in fifteen or twenty days defendants should return four other carts of the same pattern and quality as the four carts received by the defendants, then plaintiffs cannot recover, notwithstanding the defendants may have agreed to be responsible to the plaintiffs for the carts.

We think the ruling of the court was correct, and that the judgment was properly given. The liability of the defendants was undoubted, and although the proof did not strictly conform to the allegations of the petition, yet it does not appear that defendants were taken by surprise, or injured in consequence of it.

The statute declares that no variance between the allegation in the pleading and the proof shall be deemed material, unless it has actually misled the adverse party, to his prejudice in maintaining his action or defense upon the merits; and that when it shall be alleged that a party has been so misled, the fact shall be proved to the satisfaction of the court by affidavit, showing in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just. The statute further provides, that when the variance between the allegations in the pleading and the proof is not material, the court may direct the facts to be found according to the evidence, or may order an immediate amendment without costs. (2 Wagn. Stat., pp. 1033-4, §§ 1, 2.)

It is obvious that there was no surprise in this case, nor was the defendant misled to his prejudice. He knew what the demand was for, and had previously acknowledged his liability. The variance was an immaterial one, and if it were otherwise, he should have proved that fact to the satisfaction of the court, and had the pleading amended upon terms. (Fischer vs. Max, 49 Mo., 404; Turner v. Chillicothe & Des Moines City R. R. Co., 51 Mo., 501.)

Let the judgment be affirmed; the other judges concur.

Sparks v. Clark, Auditor.

SAMUEL P. SPARKS Relator, vs. GEO. B. CLARK, State Auditor, Respondent.

1. *Revenue—Assessment of sub-divisions—Constr. Stat.*—The proper meaning of § 49 of the Revenue Act, (Wagn. Stat., 1167,) is that all sub-divisions of a section belonging to the same person should be reported as one tract although such sub-divisions may not be contiguous.

Petition for Mandamus.

Jones & Johnson, for Relator.

Attorney Genl. for Respondent.

NAPTON, Judge, delivered the opinion of the court.

The only question in this case is the construction of section 49 of the Revenue Law, which provides in reference to Assessor's duties, that "when any person shall be the owner or original purchaser of a section, half section, quarter section or half quarter section, block, half block, or quarter block, the same shall be assessed as one tract, and the name of such person placed opposite thereto."

The Auditor construes this provision as requiring all sub-divisions of a section belonging to the same person, to be reported as one tract, although such sub-divisions may not be contiguous; and this, we think, is the proper construction, whether regarding the language of the section, or its manifest intent. The object of the provision is to prohibit unnecessary multiplication of costs and expenses accruing to the owner in all the various stages of collecting the taxes. The law for this purpose attaches no importance to the contiguity of various sub-divisions of a section, which, in point of fact, may be entirely separate tracts, with other land intervening and at a distance of a half mile apart. For all the purposes of assessment—making out delinquent list, publication of the same, and all other purposes connected with the revenue, state or county—these separate tracts are declared to be one. The reason is plain, since, however many tracts of 40 or 80 acres may be owned by one person in the same section, they can be readily designated by a single line in

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the tabular form directed for the Assessor's books,—the section, township and range being the same. It will be observed that no mention is made in the section of a less subdivision than a half quarter, because, where the owner has but 40 acres in the section, it must of course be reported as one tract; but in regard to all other sub-divisions exceeding 40 acres, the provision is specific and requires them all to be assessed as one tract, and they are declared by law to be but one tract, so far as any and all the acts of the revenue officers are concerned.

Mandamus refused. All the judges concur.

MARY WICKERSHAM Respondent, *vs.* **A. C. WOODBECK**, Appellant.

1. *Register of lands—Official character of, how established.*—It is not necessary in order to establish the official character of the Register or Receiver of Lands of the State, that anything more be proven than that they acted in the offices which they assumed.
2. *Land Titles—Register of Lands—Receipt by, passes what title.*—The receipt of the Register and Receiver for the purchase money of land, is evidence that the State has passed at least its equitable title, although no patent has issued.
3. *Limitations, statute of—Land vested in the State.*—Land vested in the State of Missouri while the act of 1857, (Sess. Acts 1856-7, p. 78, § 9,) was in force was subject to the bar of the statute of limitations.

Appeal from Cedar Circuit Court.

R. F. Buller, for Appellant.

W. D. Huff, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This is an action of ejectment for forty acres of land in Cedar County. The land in controversy is a portion of the lands acquired by the State under the Act of Congress of Sept. 4th, 1841, entitled "An act to appropriate the proceeds of the sales of public lands and to grant pre-emption rights."

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The plaintiff had a patent from the State dated Oct. 10th, 1867, reciting a purchase on the 3rd day of Oct. 1867. The answer set up the statute of limitations. The answer further set up as a defense, that on Feb. 13th, 1860, one N. J. Jones was receiver and James S. Jones was register of the State Land Office at Springfield, Mo., and that on said day one David Lindley purchased from them as agents of the State, the land in controversy at the price of fifty dollars or \$1.25 per acre; that the said Lindley paid the purchase money and received from said register and receiver a duplicate receipt therefor and certificate of location thereof, and immediately thereafter took possession of the same, claiming title thereto, and remained in visible, open and notorious possession thereof until the 18th day of October 1867, when he sold the land to defendant for \$280, which defendant paid in cash, and immediately went into possession and has remained in possession ever since up to the time of commencing this action.

The case was tried at the May Term, 1872 of the Circuit Court of Cedar County. The plaintiff introduced the patent from the State in 1867, and rested. The defendant then offered in evidence, a paper purporting to be a duplicate receipt and certificate of location of the land in controversy, dated Feb. 13th, 1860, and signed by the register and receiver of the State Land Office at Springfield, with proof that the signatures were genuine and that the officers signing it were State officers or acted as such at that time. These duplicates were as follows:

State Land Office at Springfield, Mo., Feb. 13th, 1860.

Received of David J. Lindley of the County of Cedar, State of Missouri, one hundred dollars and — cents, being in full for the S. W. qr. of S. E. qr. and S. E. qr. of S. W. qr. of section No. 7, township No. 33, range No. 28, containing 80 acres and — hundredths at \$1.25 per acre. Signed

N. J. Jones,
Receiver.

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"I do hereby certify that I have sold to David J. Lindley the S. W. qr. of S. E. qr. and S. E. qr. of S. W. qr. of section No. 7, township No. 33 of range No. 28, as the foregoing receipt specifies, and that the foregoing is the receiver's receipt for the purchase of the same. Signed

James S. Jones,
Register.

This evidence was excluded by the court, on the ground that the official character of the State register and receiver could not be established by parol evidence, and that the duplicate was not the proper evidence of an entry at the land office.

The defendant then offered to prove that Lindley had taken possession of the land and made improvements on it in 1860, and been in possession until 1867 when he sold to defendant who had been in possession ever since, and made valuable improvements on the land without notice of plaintiff's claim. But this evidence was excluded on the ground that the statute of limitations did not run against the State. The plaintiff had a verdict and judgment.

We are unable to conjecture upon what ground the court excluded the duplicate receipts of the register and receiver. Whether the title acquired by them would avail against a subsequent patent is another question, but it is clear that the receipt should have been admitted in evidence. The proof of the genuineness of the signatures was ample, and it is not necessary in order to establish their official character that anything more should be shown than that they acted in the office which they assumed.

Our statute recognizes receiver's receipts as a title sufficient to sustain an ejectment against any one not having a better title; and their admissibility is beyond dispute. Their duplicate receipts are the only evidences of title which the purchaser from the State can receive on his application to buy. The purchaser has no control over the land officers, or their acts subsequent to an entry. The government appoints them and if they are false to their trust, it is abhorrent to every

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principle of justice that those who deal with them should suffer by their failure to comply with their duty. The register's and receiver's receipt is evidence that the State has passed the title, although the formality of a patent is wanting. The equitable title is at least passed, for the purchase money is paid, and the State cannot transfer her title, which is a mere naked legal title, to another.

The statute of limitations was also interposed in this case, and the court excluded all evidence of adverse possession, on the ground that the State was not within the statute. This question has been examined and disposed of in two cases decided by this court. (*Abernathy vs. Dennis*, 49 Mo., 469, and *School Dist. of St. Charles Township vs. Georges*, 50 Mo., 195. See also, *Burch vs. Winston*, next case in this volume.)

The judgment is reversed and the cause is remanded; the other judges concur.

O. G. BURCH, Defendant in Error, vs. T. M. WINSTON, et al., Plaintiff in Error.

1. *Limitations, statute of—Land vested in the State.*—Land vested in the State of Missouri while the act of 1857 (Sess. Acts, 1856-7, p. 78, § 9) was in force, was subject to the bar of the statute of limitations; and in an action by one holding under the State to recover such land, it might be pleaded, although suit was brought subsequent to the act of 1865. (Gen. Stat., 1865, p. 746, § 7.)

Error to Cole Circuit Court.

E. L. Edwards & Son, for Plaintiff in Error.

E. L. King & Bro., for Defendant in Error.

VORIES, Judge, delivered the opinion of the court.

This was an action of ejectment, brought by the plaintiff in the Cole Circuit Court, on the 19th day of November, 1869, to recover from the defendants a lot of land in Jefferson City, known as inlot eight hundred and thirty-one.

The petition was in the usual form.

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The defendants by their answer denied the allegations of the petition, and then set up the statute of limitations, charging that neither plaintiff, his ancestors, predecessors, grantors or persons under whom he claims, was seized or possessed of the premises described in plaintiff's petition, within ten years before the commencement of the action. The defendants also set up a further special plea which we need not notice, as with any view of the case the whole controversy depends on the plea of the statute of limitations. The plaintiff replied denying the new matter set up in the answer.

On the trial of the cause, the plaintiff offered in evidence a deed from Daniel Rice, as commissioner of the permanent seat of government, purporting to convey the lot in controversy to the plaintiff. This deed purported to have been executed on the 8th day of June, 1868.

The defendants objected to this deed, for the reason that said Rice had no authority to sell said lot. The court overruled the objection, and admitted the deed in evidence—to which the defendant excepted. As no objection is made to the form of the deed, it need not be set out here.

It was admitted by the defendants, that the lot in controversy was a part of the land donated by the United States to the State of Missouri, for a permanent seat of government.

The plaintiff then introduced defendant, Winston, as a witness in the case, whose evidence was in substance, that the lot sued for had been enclosed by him, and in its present condition was worth to him one dollar per month. On cross-examination he stated that he fenced the premises by the permission of defendant Young, and had the same in his possession for eleven or twelve years; that it would be twelve years in November, 1869; that he had it in cultivation during all of that time; that the rent of the lot would not be worth anything if it were not fenced. He further stated that he paid no rent for the lot; that at the time he took the possession of the lot it was unoccupied; that he held the lot during the time before stated, under Judge Young.

The defendants then offered in evidence a deed dated in 1866,

purporting to have been executed to defendant Young and one Wells, by the collector of revenue of Cole County, upon a sale of the premises for taxes, commonly called a tax deed. This deed was objected to by the plaintiff, and the deed excluded by the court, to which the defendants excepted. It was then proved that the lot in controversy had been assessed to Young in the year 1868; that he had refused to pay the taxes, saying that the lot did not belong to him.

The defendant, in order to explain how it happened that he said in 1868 that the lot did not belong to him, offered to prove that he had employed an attorney in the year 1868, to write a deed conveying the lot to one White, to whom he said he had sold the lot, so as to have the deed ready to tender to said White. This evidence was objected to by the plaintiff, the objection was sustained by the court, and the defendant excepted.

There being no further evidence offered on either side, the court, at the request of the plaintiff, instructed the jury as follows:

“1st. If it appear to the jury that the lot in question was given to the State of Missouri by the United States, and that by deed of date 8th day of June, 1868, the Commissioner deeded said lot to plaintiff, they will find that the plaintiff is entitled to the possession of the lot, and they will find further from the evidence what damages plaintiff has sustained by reason of the detention of said lot—also they will find from the evidence the value per month of the rents and profits of said lot.”

“2nd. The jury are instructed that all evidence offered by the defendants as to their claim of title and their possession of the lot, is excluded from their consideration.”

The defendants at the time objected to these instructions and excepted.

The jury then returned a verdict in favor of the plaintiff, after which the defendants, in proper time, filed their motion to set aside the verdict and grant them a new trial, assigning as grounds for said motion, the ruling of court before excepted

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to. The court overruled their motion, and rendered final judgment on the verdict, to which the defendants again excepted, and have brought the case here by writ of error.

It will be seen from the foregoing statement of the facts appearing on the record in this case, that the Circuit Court in trying the case, wholly ignored the defense of the statute of limitations as set up, and attempted to be proved by the defendants, excluding all evidence in reference thereto. And the only question necessary to be examined in this court is as to the correctness of the rulings of the court on that subject.

It is insisted by the plaintiff, that the statute of limitations does not run against the State or against property belonging to the State, and that, consequently, the statute could not run in this case against the plaintiff, until after his purchase of the lot in 1868. This seems to have been the view of the court trying this case, as its action in excluding all evidence in reference to the possession of defendants, and tending to sustain the defendants' defense of the statute of limitations, cannot be accounted for on any other supposition.

By the ninth section of the 2nd Article of the Act of 1857, prescribing the times of commencing actions, it is provided as follows: "§ 9. The limitation prescribed in this act shall apply to actions brought in the name of this State, or for its benefit, in the same manner as to actions by private parties." (Sess. Acts 1856-7, p. 78.) This statute was in force at the time that the defendants took possession of the lot in controversy. It is true that section 7 of chapter 191, Gen. Stat. 1865, p. 746, provides that, "nothing contained in any statute of limitations shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use, or to any lands belonging to this State." The 32nd section of the same chapter provides that, "the provisions of this chapter shall not apply to any actions commenced, nor to any cases where the right of action or of entry shall have accrued before the time when this chapter takes

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effect, but the same shall remain subject to the laws then in force."

It has been held by this court in a number of cases, that where the right of action accrued before the taking effect of this last named act, the statute of limitations was a good plea, even as against the State. (Abernathy vs. Dennis, 49 Mo., 468; School Directors vs. Georges, 50 Mo., 194, also see the preceding case of Wickersham v. Woodbeck.)

These cases are conclusive in reference to the issues made on the statute of limitations. In this case, the right of action accrued before the act of 1865, and the case must be governed by the act of 1857. The evidence in the case strongly tended to prove that the defendants had been in actual possession of the lot, for more than ten years before the commencement of the suit, under a claim of title or right thereto. The court therefore erred in excluding from the jury the evidence which tended to prove this adverse possession. The issues made on the plea of the statute of limitations should have been submitted to the jury under proper instructions.

The judgment is reversed and cause remanded. The other judges concur.

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BELFORD S. WALKER, Defendant in Error, *vs.* THOMAS BRADBURY, Plaintiff in Error.

1. *Sheriff—Failure of to collect on execution—Recovery against for—What remedy against—Execution defendant.*—A sheriff who, through neglect, has failed to collect money on an execution, and in consequence of such failure has been compelled to pay the debt to the plaintiff in the execution, cannot afterward in an ordinary action recover such amount from the defendant in the execution.

Error to Morgan Circuit Court.

A. W. Anthony, for Defendant in Error.

J. A. Spurlock, for Plaintiff in Error.

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SHERWOOD, Judge, delivered the opinion of the court.

The only question of any practical importance in this case, is whether a sheriff, who, through neglect, has failed to collect money on an execution, and in consequence of such failure, has been compelled to pay the debt to the plaintiff in the execution, can afterwards, in an ordinary action, recover such amount of the execution defendant.

The rule seems to be well settled that a recovery under such circumstances cannot be had. Thus, in *Pitcher vs. Bailey*, (8 East., 171) it was held that an "officer could not raise any cause of action by the payment of money for another, on account of his own breach of duty." This case followed that of *Eyles v. Faikney*, (K. B. Easter, Term,) 32 Geo. 3.

In *Gwynne on Sheriffs*, 5, 6, 7, it is stated, that the officer cannot recover "from a debtor, money paid in neglect of his duty, unless when it is specifically provided for by statute."

In *Bigelow vs. Provost*, (5 Hill, 566) Cowen, J., in delivering the opinion of the court, remarked: "It would tend little to the prompt execution of a sheriff's duty, if we should encourage him to delay by holding out the hope that he may save himself through any expedient. It is but another name for encouragement to violate his duty; and cases of abstract morality will soon be invoked as a precedent for the most flagrant instances of misconduct."

Whether an officer, who, upon the promise of the defendants, of re-payment or otherwise, satisfies the execution out of his own proper funds, would be entitled to subrogation in equity to the rights of the execution plaintiff, is a question not presented by this record, and whose determination, therefore, would be merely anticipatory.

For these reasons, the judgment will be reversed, and the cause dismissed. All the judges concur.!

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ABEL J. BACON, Defendant in Error, *vs.* JOHN D. MORRISON, Plaintiff in Error.

1. *Administrator's sale—Land purchased by Judge—Report of sale, etc.*—An administrator's sale and deed of land are not rendered invalid by reason of the fact that another and distinct tract, sold at the same sale, was purchased by the probate Judge, contrary to law, and that the same report, reciting both sales, was approved by the Probate Court.

Error to Cedar Circuit Court.

W. P. Johnson, for Plaintiff in Error.

S. H. Sherlock, for Defendant in Error cited, Sess. Acts, 1847, p. 48, § 8; 1 Wagn. Stat., 1872, 98, § 34; Walton *vs.* Torrey, Harr. Ch. (Mich.) 259; Speck *vs.* Wohlein, 22 Mo., 310; Strouse *vs.* Brennan, 41 Mo., 289; Mitchell *vs.* Bliss, 47 Mo., 353; Goodhue *vs.* Berrien, 2 Sand. Ch., 630; Oakley *vs.* Aspinwall, 3 Comst., 547; Wilson *vs.* Trabb & C., 20 Iowa, 231; Groesbeck *vs.* Seeley, 13 Mich., 329; Beaman *vs.* Whitney, 20 Maine, 413; Withers *vs.* Baird, 7 Watts, 227; Broom's Leg. Max. p. 85; 3 Chitty's Gen. Pr., 9; Co. Lit., 141; Paley Ag., 32; Beal *vs.* Harman, 38 Mo., 435; State to use of Doddson *vs.* Scroggs, 47 Mo., 285; Teakle *vs.* Bailey, 2 Brock, 44-51; Banks *vs.* Judah, 8 Conn., 145-157; Church *vs.* Marine Ins. Co., 1 Mason, 341; Barter *vs.* Marine Ins. Co., 2 Mason, 369; Copeland *vs.* Mercantile Ins. Co., 6 Pick., 198-204.

ADAMS, Judge, delivered the opinion of the court.

This was ejectment for forty acres of land in Cedar county, being the south-east quarter of the north-east quarter of section 36, in township 36, of range 27 west.

Both parties claim title under one James Musgrave, deceased. The plaintiff claims under a purchase at a sale made by the administrator of Musgrave, deceased, for the payment of debts, and the defendant is in possession as tenant of the heirs of said deceased.

The agreed case shows that the sale made by the administrator consisted of several distinct tracts of land, and that among the tracts sold was one bought by the judge of the Probate Court of Cedar county; that the administrator made his re-

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port of sale of all the tracts, and the report, embracing the land in dispute, and also the tract sold to the Probate Judge, was, at the proper term of the Probate Court, regularly approved by the court. But the heirs were not present or consenting to such approval.

The only objection raised to the administrator's sale and deed, under which the plaintiff claims, is that the report of sale, as approved by the Probate Court, contained the tract of land sold to the judge who approved the sale. The eighth section of the act establishing the Probate Court in Cedar county, reads as follows: "No judge of probate shall sit on the determination of any cause or proceeding in which he is interested or related to either party; such cause or proceeding shall be certified to the County Court, and said County Court shall proceed thereon as the Probate Court might have done." (See Sess. Acts, 1847, p. 41.) The only matter in which the probate judge was interested, was the tract of land purchased by himself. A report of sale is not such an entirety as not to be approved in part and rejected as to other parts. If the report contains the sales of several tracts of land to various parties, certainly some may be good and others bad. And the court might approve the good ones and reject the bad sales.

I am inclined to think the judge had no right to abdicate his own jurisdiction as to the purchases made by other parties. It was his duty to act on the sales to other parties, and approve or reject the report as to them, and so far as his own purchase was involved, he might have sent the report of such sale to be acted on by the County Court.

Whether the sale, as to himself, was void as not being properly approved, need not be passed on by us.

Certainly his approval of the sales to the other purchasers, ought not to be affected by his interest in a separate and distinct sale to himself. Under this view, the administrator's sale and deed, under which the plaintiff claims, vested the title in him.

This leads to an affirmance of the judgment, which was for the plaintiff. Judgment affirmed; the other judges concur.

State, ex rel. v. County Court of Bates Co., et al.

STATE, *ex rel.*, TEB & NEOSHO R. R. CO., *et al.*, Respondents,
vs. THE COUNTY COURT OF BATES CO., *et al.*, Appellants.

1. *Railroads—County Courts—Subscription of stock—Mandamus to compel will not lie after completion of road, etc.*—Under the Act of March 23rd, 1868, (Adj. Sess. Acts 1868, p. 92) mandamus would not lie on behalf of a railroad company or tax-payers of a township to compel the County Court to subscribe stock to the railroad after the same had been fully completed through the township. The company could have no legal interest in the subscription until actually made and accepted by it; and so far as the county was concerned, the authority to make the subscription ceased as soon as the road was completed through the township. It was not contemplated by the above act, that townships should be allowed to take stock in roads already built.

Appeal from Benton Circuit Court.

Waldo P. Johnson, for Appellants.

I. The Act of March 23rd, 1868, does not form any part of the railroad charter, and was never accepted by the company as such, and the township had no legal right or authority to become a stockholder in the road.

II. The railroad has been completed; and hence, the proceeds of the bonds cannot be appropriated in said township as the road progressed.

La Due & Fyke, for Respondent.

I. If it appears from the return of the election that no less than two-thirds of the qualified voters of a township voting at such election are in favor of the subscription, it shall be the duty of the County Court to make the subscription. (Wagn. Stat., 313, § 51.)

II. Any County Court on refusing to perform any of the duties required of them by this chapter, may be proceeded against by writ of mandamus, to be sued out of the Circuit Court of the County. (1 Wagn. Stat., § 22, p. 306.)

ADAMS, Judge, delivered the opinion of the court.

This was an application for a mandamus which originated in the Bates Circuit county, and was taken by change of venue to the Circuit Court of Benton county.

State, ex rel. v. County Court of Bates Co., et al.

The Tebo and Neosho Railroad Company and some fifteen tax-payers of Prairie City township, in Bates county, are the relators, and as such ask for a mandamus to compel the County Court of Bates county to subscribe twenty-five thousand dollars to the capital stock of said railroad company on behalf of the township, and to issue bonds of the township in payment thereof. The following facts are alleged in the petition which was presented and filed at the March adjourned term for the year 1871, of the Bates Circuit Court.

In February, 1869, more than twenty-five tax-payers, residing in Prairie City township, in Bates county, under and in pursuance of the act of the Legislature of the 23d of March, 1868, petitioned the County Court of Bates county to cause an election to be held in the township to take the sense of the voters on the question whether there should not be subscribed to the capital stock of said railroad company for said township, twenty-five thousand dollars to be paid for in the bonds of the township, the subscription to be made with the condition that the railroad company should build the railroad through the township, the proceeds of the bonds to be expended in building the road within the township, and to be issued as the work progressed. The County Court did, in pursuance of this petition, order the election, which was held on the 9th of March, 1869, and resulted in ninety votes for and three against the proposed subscription, which were more than two-thirds of the qualified voters, as alleged in plaintiffs' petition.

After this election was held, the railroad company built and completed their railroad through Prairie City township, and it went into full operation, running its cars each way regularly through the township and has ever since continued to do so, and expended in the township in building the road more than the sum of one hundred and fifty thousand dollars.

After the road was thus completed and in full operation through said township, the railroad company applied to the County Court of Bates county to subscribe the twenty-five thousand dollars to the capital stock, which had been voted

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by the township, and the court refused to make the subscription and to issue the bonds of the township as demanded by the company.

Afterwards, in 1871, this application for a mandamus was made to the Circuit Court of Bates county, and an alternative mandamus was issued, and the County Court filed its return. After the case went to Benton county the plaintiffs filed a motion to quash the return, which was sustained, and the defendants excepted and offered to file an amended return, but the court refused to permit it to be filed and ordered a pre-emptory mandamus. The defendant filed a motion to set aside this judgment which the court overruled, and the defendants excepted and filed bond, etc., for an appeal, which was granted ; and the case is standing here on this appeal, which operates as a *supersedeas*. From the view that I take of this case it is unnecessary to set out the return of the defendants, which was quashed by the court, or to pass upon the points raised and discussed in the briefs of counsel, growing out of the defense set up in the return.

It is manifest from the facts set forth in the petition for the mandamus, that the relators have no standing in court. Certainly the railroad company could have no legal interest in the proposed subscription to their capital stock, until it was actually made and accepted by the company. The result of the election invested the company with no legal interest. It only authorized the County Court to make the subscription which the railroad company might or might not accept at their option.

But although the County Court was invested with authority to make the subscription, it was not made ; nor was it demanded till long after the road had been constructed and in full operation through the township. The authority to make the subscription ceased as soon as the road was completed through the township. It was not contemplated by the act of the Legislature of 1868, that townships should be allowed to take stock in roads already built. As the road through the township was an accomplished fact, the very object of the

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proposed subscription had been realized without such aid before the application was made to the county court to exercise the power given by the vote of the township. The tax-payers have no standing to maintain this proceeding. If they ever had, it certainly ceased when the road had been completed through the township. What benefit would it be to the tax-payers to become stockholders in the railroad company? There is nothing in the record to show that the stock is worth anything; and whether it is worth much or little, in my judgment the authority for making the subscription had ceased before the application was made.

Let the judgment be reversed and the petition dismissed. The other judges concur in the result.

—o—

JOHN KENNEDY, Defendant in Error, *vs.* Estate of A. A. KENNEDY, Plaintiff in Error.

1. *Equity—Resulting trusts as to land—Parol statements—Evidence touching.*—In suit against the heirs of a deceased person to establish a resulting trust as to land, in plaintiff's favor, on the basis of parol admissions, the evidence to warrant a recovery must be so emphatic and unequivocal as to banish every reasonable doubt from the mind of the chancellor respecting the existence of the trust. Evidence as to such statements unless strongly corroborated will be insufficient.

Error to Franklin Circuit Court.

Henry Flanagan & T. W. B. Crews, for Appellant.

I. Mrs. Kennedy, wife of the plaintiff, was in no sense his agent. The facts show that he was present when the alleged payment was made to A. A. Kennedy, in the full possession of his faculties, acquainted with all the circumstances, qualified, by education and otherwise, to manage his own affairs. His wife, on the other hand, could neither read nor write, and was in no respect peculiarly fitted for the office. But there is no evidence from which her agency can be in-

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ferred. Her statement that she was her husband's agent does not, of itself, make her such. The payment, by her, of the money in her husband's presence, was not such an act as will raise the presumption of agency. (Sto. on Agency, § 3; 41 Mo., 510.)

II. Where it is sought to establish a resulting trust in lands the payment of the purchase money by the *cestui que trust* must be proved by clear and undoubted evidence; otherwise, a court of equity will not interfere. The payment of the purchase money by the *cestui que trust*, and not the agreement of the parties, is the fact from which the law implies the trust; and that must not be left in doubt, but must be established beyond a question. No inferences can be indulged. (Farrington vs. Barr, 36 N. H., 86; Gascoigne vs. Twing, 1 Ver., 366; Enos vs. Hunter, 4 Gill., 211; Kellogg vs. Wood, 4 Paige, 579; Partridge vs. Havens, 10 *Id.*, 618; Farringer vs. Ramsey, 4 Md. Ch., 33; Baker vs. Vining, 30 Me., 121; Johnson vs. Quarles, 46 Mo., 423; Ringo vs. Richardson, 53 *Id.*, 385; Paige vs. Paige, 8 N. H., 187.)

III. Where the purchaser is dead, (as in the case at bar) evidence of his declarations is very unsatisfactory, on account of the facility with which it may be fabricated and the impossibility of contradicting it. It has never been considered, of itself, sufficient to establish a resulting trust. (Lench vs. Lench, 10 Ves., 518; Enos vs. Hunter, 4 Gill., [Ills.] 211; 1 Hoffman Ch., 90; Jackson vs. Moore, 6 Cow., 706; Jackson vs. Bateman, 2 Wend., 570; Jackson vs. Matsdaf, 11 John., 91; Boyd vs. McLean, 1 John. Ch., 216.)

IV. Giving the evidence of the plaintiff full credit, we submit that he cannot recover. In order to raise a resulting trust, "the whole consideration for the whole estate, or for a moiety, or for a third, or for a joint tenancy or tenancy in common in the whole or in a particular fraction, or for some other definite part of the whole, or for a particular interest, must be paid in order to be the foundation of the trust. The contribution or payment of a sum of money, generally, when such payment does not constitute the whole consideration,

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does not raise a trust by operation of law, for him who pays it. The reason of this distinction is, that neither the entire interest in the whole estate, nor in any given part of it, could result from such a payment to the party who makes it, without injustice to the grantee by whom the residue of the consideration is contributed." (Per Chancellor Jones, in *White vs. Carpenter*, 2 *Paige*, 241.)

In the case at bar, the important element of a resulting trust, namely, that the grantee should receive the title without paying or incurring any liability to pay any part of the consideration money is wanting. It is admitted that the grantee paid a considerable portion of the purchase money; hence, no trust results to plaintiff. (Smith vs. Burnham, 3 *Sum.*, 467; Sayre vs. Townsend, 15 *Wend.*, 647; Freeman vs. Kelley, 1 *Hoff.*, 90; Perry vs. McHenry, 13 *Ill.*, 227; McGowan vs. McGowan, 14 *Gray*, [Mass.] 119; Cutler vs. Tuttle, 4 *E. C. Green.*, [19 *N. J.*] Eq., 549; Dudley vs. Batchelder, 53 *Me.*, 403.)

V. "Where it is sought to establish a resulting trust by parol evidence, courts have ever been careful to examine into every circumstance which may affect the probability of the alleged claim, as a lapse of time, the means of knowledge and circumstances of the witnesses; and the relief sought will not be granted, when the evidence is not clear in support of the alleged right; especially where no claim has been set up during the life-time of the trustee, but is raked up and charged against the heirs, who may not be supposed to know anything about, or able to defend it as their ancestor would." (Per Caton, J., in *Enos vs. Hunter*, 4 *Gill.*, [Ills.] 211.)

Jesse White and R. H. Husser, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This was a suit in the nature of a bill in equity brought by John Kennedy against the heirs and widow of Allen A. Kennedy deceased, and also against the administrator of the decedent's estate to have a resulting trust established in plaintiff's favor as to a lot in Pacific, in Franklin County, the

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petition alleging that decedent was the agent of plaintiff, had been employed by him and furnished with \$900 to buy said lot for plaintiff and had agreed to purchase the same as the agent of plaintiff's and supply any defect which might arise in completing the payment of the purchase money; that decedent afterwards bought the lot of the railroad company for \$1,200, received a conveyance in his own name and agreed with plaintiff to re-convey to him upon the payment of the sum of \$400 which decedent has advanced in addition to the \$900 previously furnished; but that decedent had died without having executed to the plaintiff the promised conveyance. The petition concludes with a prayer for a decree divesting defendants of all title to the real estate mentioned in the petition, upon the payment of the alleged balance of the purchase money, and for other and further relief.

The answer was a statutory general denial, and on the case being submitted to the court on the evidence adduced, a decree as prayed was rendered in behalf of plaintiff.

I have examined with care the evidence in this cause and find myself unable to arrive at the same conclusion reached by the court below. That evidence is altogether parol, consisting, with one exception which will be presently noticed, of alleged verbal statements and admissions of the deceased Allen A. Kennedy.

The subject of resulting trusts and the nature and amount of testimony necessary to establish them, has heretofore been discussed by this court, notably in the cases of *Johnson vs. Quarles*, (46 Mo., 423,) and *Ringo vs. Richardson*, (53 Mo. 385,) in which the leading authorities in relation to these trusts are examined and reviewed at some length. And the result deducible from those cases and the authorities therein cited is briefly this:

That where it is sought to establish by parol evidence a resulting trust of the character mentioned and charged to exist in the plaintiff's petition, such evidence must be so strong and unequivocal as to at once banish every reasonable doubt from the mind of the chancellor respecting the existence of such

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trust; that evidence of verbal statements and admissions alleged to have been made by a deceased person in regard to the ownership of the money which forms the basis of such trust is, unless supported by strong corroborative evidence, as for instance that the claimant's money was placed in the hands of the deceased for investment, wholly insufficient.

And yet it is by Mrs. Kennedy the wife of plaintiff alone that it is proposed to show that plaintiff was the owner of the \$900, alleged to have furnished the decedent. She testifies that she was the agent of her husband; that he was incapable of attending to his own business. But on the point of her husband's capacity, she is flatly contradicted by several witnesses, by whom it is shown that her husband was a fair scholar, kept his own papers and books, attended to his own business affairs, loaning small sums of money and the like, while she was very illiterate and could neither read nor write. This witness testified that as the agent of and in the presence of her husband she paid the \$900 to the deceased. Under such circumstances however she could not be regarded as the agent of her husband, since the mere handing the money in her husband's presence, is a transaction possessing none of the elements of agency about it. And since the testimony of Mrs. Kennedy as to the payment of the money to the decedent, must be rejected, it follows that there is an entire dearth of testimony in this particular and the case must rest upon verbal declarations, and admissions of him through whom the heirs derive title to the land in question. But could this difficulty be surmounted, the plaintiff is met with one equally fatal to his claims; for his wife, but a short time before Allen A. Kennedy's death, about six weeks after the purchase of the lot from the R. R. Co. and during his last illness, and after speaking about the critical condition in which he was, stated to Mrs. Donahue—if the latter is worthy of belief—that she "had not paid anything on the place yet," and also made use of other similar expressions, entirely at variance with the whole scope and drift of her testimony. And these statements she does not pretend to deny, but attempts to frame a flimsy

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excuse by which she seeks to avoid the force and effect of such damaging declarations..

I should be very loath, therefore, with such weak and inconclusive testimony before me to sanction so dangerous a precedent as the affirmance of the decree of the court below would create. The statute of frauds is a very wholesome one, whose enactment originated in sound wisdom and a just appreciation of the dangers to be apprehended from "slippery memory," and many eminent jurists have frequently expressed unfeigned regret that the rigor of that safe law had ever been abated by innovations of any character. But since those innovations have become imbedded in our system of jurisprudence, the disposition exists and finds an entire unanimity of expression in all the courts, to keep them strictly confined within the barrier originally assigned them, and to require evidence, where any interest in lands is sought to be created or affected, almost, if not altogether, as conclusive as the note or memorandum required by the statutes referred to.

Judgment reversed and petition dismissed.

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SCHMEIDING, *et al.*, Defendants in Error, *vs.* A. W. EWING, Assignee, etc., Plaintiff in Error.

1. *Mechanic's lien—Account—Items of—Time of filing.*—If the several items of an account form parts of one contract, and the last accrues within the statutory limit before the time of filing the lien, it will attach as to all.
2. *Mechanic's lien—No personal judgment against the owner of the building.*—In a suit to enforce a mechanic's lien, no personal judgment can be obtained against the owner of the building, who was not a party to the contract for the work or materials.
3. *Practice, civil—Supreme Court—Case reversed on question of fact, when.*—The Supreme Court will reverse on a question of fact, where such fact is material to plaintiff's right to recover, and is wholly without proof.

Error to Cole Circuit Court.

E. L. Edwards & Son, for Plaintiff in Error.

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Ewing & Smith, for Defendants in Error.

VORIES, Judge, delivered the opinion of the court.

This action was brought in the Cole Circuit Court, to enforce a mechanic's lien or material man's lien, against a house and premises in the petition described.

The petition charged that the defendant, Moeller, had contracted with Schmidt, to furnish the necessary materials and do the carpenter work to be done in the erection of a house in Jefferson City, which was described in the petition; that plaintiffs at divers times, from the 13th day of February, to the 5th day of June, 1869, had sold to said defendant, Moeller, as such contractor, materials to be used by him in doing the necessary carpenter's work in the erection of said building, and in which said materials were so used; and accounts of the materials sold, are attached to the petition, with the credits thereon.

The petition then charges that after plaintiffs had given defendant, Schmidt, the required notice, they, on the 4th day of October, 1869, filed their account with the clerk of the Circuit Court for Cole county, as the law directs, for the purpose of making and enforcing a lien against the said house, so erected by said Schmidt. Judgment is prayed for the sum charged to be due, and to subject the house and lot described in the petition, to the payment of the judgment, etc.

After the commencement of the suit, defendant Moeller became a bankrupt, and his assignee was made a party to the action.

Defendant, Schmidt, filed a separate answer, in which he admits the contract of Moeller to do the carpenter's work on his house, but denies all other material allegations of the petition.

The assignee of Moeller only answered that he had no knowledge or information on the subject, and asks that the plaintiff may be required to prove the facts stated in the petition.

At the May term of the Cole Circuit Court, the case was called for trial, a jury was waived by the parties, and the case submitted to the court for hearing.

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After the evidence had been heard on the part of the plaintiffs, the defendants asked the court to declare the law to be, that upon the pleading and evidence in the case, the plaintiff had no right to recover, and that the court should find for the defendants.

This declaration of law was refused by the court, and the defendants offered no evidence. The court found the issue for the plaintiffs and rendered a judgment against both defendants, and ordered the sale of the property named in the petition to satisfy the same. To this action of the court, the defendants at the time excepted. Afterwards, in due time, the defendants filed their several motions for a new trial and in arrest of judgment. These motions having been severally overruled, the defendants again took their several exceptions, and have brought the case to this court by writ of error.

The only ground for a reversal of the judgment of the Circuit Court, relied on by the defendants in this court, is that there is a total absence of any evidence in the case, as to some of the material facts necessary to a recovery on the part of plaintiff, at least as to defendant Schmidt.

There is no question made as to the giving notice to Schmidt, by the plaintiffs, of their demands against Moeller, or as to their having filed their accounts as a lien, on the 4th day of October, 1869, or its sufficiency in form. But it is insisted that there is no evidence that tends to prove that any goods were sold to Moeller within four months previous to the filing of the lien by plaintiffs, and that, therefore, no judgment could be rendered against Schmidt, or his property attempted to be charged with the lien.

The Statute provides "that it shall be the duty of every original contractor within six months, and every journeyman and day laborer within thirty days; and of every other person seeking to obtain the benefits of the provisions of this chapter, within four months after the indebtedness shall have accrued, to file with the Clerk of the Circuit Court of the proper county a just and true account of the demand due him or them, after all just credits have been given, which is to be a lien, etc." (Wagn. Stat., 909, § 5.)

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Under this statute plaintiffs in order to have created a lien on the house for which the materials were furnished, must have filed the account required by the statute, with the clerk of the Circuit Court of Cole county, within four months after the accruing of the last item sold to Moeller, the contractor. (Livermore vs. Wright, 33 Mo., 31.)

The account, as filed by the plaintiff in this case, consisted of various items, which, from their dates as they appear on the account, were furnished or sold to Moeller at five different times, to-wit: on the 13th day of February, on the 23d day of March, on the 2nd day of April, on the 1st day of May; and then a number of items, amounting to \$74.55 in the aggregate, on the 5th day of June, all in the year 1869. Each of these sales are denied by the answer.

Now it is obvious, that if this last sale charged to have been made on the 5th day of June, 1869, was not then made, the plaintiff's lien was not filed in time, and their action, as to the lien, must fail. The accounts having been filed, as a lien, on the 4th day of October, 1869, were just in time, and perhaps the last day in which they could be filed, if it was true that the goods had been sold on the 5th day of June.

The only evidence offered by the plaintiff, to prove, or which tended to prove their account, or the sale of the goods sued for, was the deposition of one Samuel Heatimer. This witness testified that plaintiffs were engaged in the sale of hardware, in the city of St. Louis, in the year 1869; that he was a salesman in their store; that he was familiar with the price of hardware. The witness was shown the accounts sued on, when he stated, that during the time the account accrued, the plaintiffs were doing business in St. Louis. He further testified, that he knew defendant, Moeller; had known him for three years; that he knew defendant Schmidt since the time that defendant Moeller came into plaintiff's store with defendant Schmidt to buy some goods, when he introduced Schmidt to witness, and stated in Schmidt's presence, that they were to buy some goods for Schmidt's hotel, at Jefferson City. Schmidt looked at some

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goods, but they purchased none. Then they went away, and returned either on the same or the next day. Mr. White was then in the store, and sold goods to them. Witness did not notice what kind of goods were sold to them, but is certain that White sold them some goods. This was in the early part of 1869; it may have been February, and it may have been April. Witness further testified that he afterwards saw defendant, Schmidt, in the store of plaintiffs, on the 23rd of July, 1869, and saw him pay \$250 on this bill; that the prices charged in the account were reasonable; that the bolts and locks charged in the bill were only used in large buildings.

This was all of the evidence given in the case, which tended to prove either the account or the time of its creation.

It will be seen from the evidence, that only one sale of goods is attempted to be proved by this witness, which he says, was made either in February or April, of the year 1869. Of the goods charged in the accounts filed, items amounting in the aggregate to \$80.35, purport to have been sold on the 13th of February, 1869, and items amounting in the aggregate to the sum of \$299.55, purport to have been sold to Moeller, on the 28th of April, 1869. The evidence of the witness examined must refer to one or the other of these sales, as he says that the sale of which he speaks, and the only sale that he knows about, was either in February or April.

How the court could have found for the plaintiff, on this evidence on the items of the account charged to have been sold on the 5th of June, and thereby find that the lien was filed in four months from the making of the last item of the account, I feel at loss to know. The mere fact that defendant, Schmidt, called at plaintiffs' store in July, and paid two hundred and fifty dollars on Moeller's account, certainly was no evidence to prove that any of the items accrued on the 5th of June, when a much larger amount was charged to Moeller in February and April. But the mere fact that Schmidt paid the money on another man's account, had no tendency to prove anything, except that the amount paid was due, unless it was further shown that the whole account was shown to

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him, and that he, after seeing the items, made a general payment on it, without any objection.

We think that the declaration of law asked for by the defendants, ought to have been given, at least as to defendant, Schmidt, and that the defendants' motion for a new trial should have been sustained.

There is another objection to the judgment rendered in this case, which has not been urged by the defendants in this court. The judgment against the defendant, Schmidt, is a personal judgment, and directs that all of his other property shall be exhausted, before the house and lot, against which the lien is attempted to be enforced, can be sold for the payment of the judgment. This is certainly erroneous. There is no pretense that the goods were sold to Schmidt. The action is brought against him simply to enforce a mechanic's or material man's lien against the property of Schmidt, in the erection of which the material sold is charged to have been used. In such case, no personal judgment could be rendered against Schmidt.

We dislike to reverse judgment on the ground that the trial court has found improperly on the facts, and would not do so if there were any evidence tending to prove all the material facts in the case; but where some of the facts material to the plaintiff's right to recover, are wholly without evidence to prove them, we cannot uphold a judgment rendered without evidence.

The judgment must be reversed, and the cause remanded; the other judges concur.

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H. B. GRUBBS, et al., Respondents, vs. SAMUEL CONES, et al., Appellants.

1. Mechanic's lien—Time of filing—Clerical error may be corrected, when—
Although the indorsement made by the clerk upon the written account required by the statute to perfect a mechanic's lien, will be *prima facie* evidence as to the date of filing, it will be nevertheless competent to show that he erred in this respect; and if the fact clearly appear, it is within the province of the court before whom the suit is tried to make the correction.

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*Appeal from Barton Circuit Court.**Morgan Buller & Bray*, for Respondents.*Walser & Cunningham*, for Appellants.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding to enforce a mechanic's lien on the part of the sub-contractor, against the property on which the work and labor were performed.

Notice of the claim and lien was served upon one of the defendants, who was the owner of the property, on the 16th day of March, 1870, and the account was sworn to and filed on the 26th day of March, 1870; but the clerk by mistake indorsed it as having been filed on the 25th day of March 1870.

When the answers were filed the plaintiff presented to the court a motion to correct the indorsement of the filing on the account, so as to make it read, "filed March 26th, 1870," instead of March 25th, 1870.

This motion was sustained and the correction made by the clerk then in office, who was the successor of the clerk who originally filed the paper.

It is not denied that the correct and true filing was on the 26th day of March, and that the indorsement of another date was erroneous.

But it is contended that the indorsement was a part of the record, and it could not be altered or changed. The date of the filing becomes material, for on it depends the validity of the lien. (Wagn. Stat., 911, § 19.) The indorsement though required to be made by the clerk when he receives a paper, does not constitute the filing of the same.

The filing is the actual delivery of the paper to the clerk without regard to any action that he may take thereon. If the clerk commits a clerical error, or makes a mistake in reference to the time at which he received the paper, that will not make any difference. He may indorse upon it the wrong date, or an impossible date, and still the real date of the filing will be the same.

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Whilst the indorsement made by the clerk will be *prima facie* evidence of its truth, still it is competent to show that he erred in the matter of date; and if that fact clearly appears, it is within the province of the court to make the correction. The rights of an innocent party will not be sacrificed to a mere mistake, committed by a ministerial officer.

Judgment affirmed; the other judges concur.

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STATE OF MISSOURI, Defendant in Error, *vs.* WARREN M. PITTS,
Plaintiff in Error.

1. *Practice, criminal—Indictment for robbery in first degree—Conviction of robbery in second degree—Autrefois acquit.*—A prisoner was indicted for robbery in the first degree, and under the indictment might have been convicted of grand larceny. Being convicted of robbery in the second degree, the verdict was without his consent set aside. Held 1st, that a conviction of robbery in the second degree operated as an acquittal of the higher offense charged; 2nd, that the prisoner could not be retried under the same indictment, and found guilty of grand larceny. (See *State v. Brannon*, 55 Mo., 63.)

Error to Henry Circuit Court.

Waldo P. Johnson, for Plaintiff in Error.

H. Clay Ewing, Atty General, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted with one Carroll Brannon for robbery in the first degree.

On the trial he was convicted of robbery in the second degree, and the verdict was set aside by the court, without his consent. At a subsequent term of the court, against his objection, he was again put upon trial, on the same indictment, and convicted of the crime of grand larceny. The facts, in this case, as appear by the record, are the same as those which were developed in *The State vs. Brannon* (55 Mo., 63), with whom the prisoner was jointly indicted, and for the reason given in the opinion in that case the judgment herein must be reversed. All the other judges concur.

Rippstein, et al. v. St. Louis Mut. Life Ins. Co.

WILHELMINE RIPPSTEIN, et al., Respondents, vs. THE ST. LOUIS MUTUAL LIFE INSURANCE CO., Appellant.

1. *Life Insurance, suit against—Corporation—Cause of action accrues, when—Where suit may be begun.*—Under the statute authorizing suits to be brought against a corporation in the county “where the cause of action accrued,” (Wagn. Stat., 294, § 28.) the cause of action against a Life Insurance Company accrues at the place of death, and suit may be commenced there notwithstanding that the contract of insurance may have been entered into in another county.
2. *Practice, civil—Jurisdiction waived, how.*—An appearance to the merits and the setting up of a defense in bar to the action, waives a plea to the jurisdiction.
3. *Life Insurance Company, suit against—Formal proofs waived, how.*—In a suit on a life insurance policy, a defense charging death by *delirium tremens*, which allegation, if true, exempted the company from all liability, amounted to a waiver of the formal proofs required by the by-laws of the company.

Appeal from Gasconade Circuit Court.

R. E. Rombauer and Cline, Jameson & Day, for Appellant.

Lay & Belch, for Respondents.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a life policy of insurance issued by the defendant to Gottlieb Rippstein insuring his life in the sum of five thousand dollars, and which, upon his death, before a certain period, was to be paid to his heirs. The plaintiff sue as his heirs and allege that he died before the period referred to, in the county of Gasconade. The policy exempts the defendant from all liability in case his death was occasioned by *delirium tremens*.

The defendant, in its answer, pleaded to the jurisdiction of the court, on the ground that its chief office of business was in St. Louis, and that the cause of action could not arise in Gasconade County where the suit was brought. The answer stated, that the defendant appeared only for the purpose of pleading to the jurisdiction; but in the same answer the defendant denied the material allegations of the petition and set up as a defense, that the said Gottlieb Rippstein died of *delirium tremens*, and that the plaintiffs did not comply with

Rippstein, et al. v. St. Louis Mut. Life Ins. Co.

the terms of the policy and by-laws, in making proofs of the death, etc. The court tried the plea to the jurisdiction first, and found for the plaintiffs, and the defendant excepted.

The 28th section of the corporation law (1 Wagn. Stat., 294) allows suits to be brought either in the county where the cause of action accrued, or in the county where corporations have, or usually keep, an officer or agent for the transaction of their business. This cause of action accrued upon the death of the insured, which occurred in Gasconade County. The contract, though made in St. Louis county, was transitory and followed the person of the insured, and the cause of action accrued by his death in Gasconade County. But the appearance to the merits and setting up a defense in bar to the action, waived the matter of abatement, and it is, therefore, immaterial whether the court decided this plea rightly or wrongly. (Fugate vs. Glasscock, 7 Mo., 377; Cannon vs. McManus, 17 Mo., 345.)

The case on the merits was submitted to a jury and resulted in a verdict and judgment for the plaintiffs, from which the defendant has appealed to this court.

After the death of the insured, the plaintiffs applied to the defendant for the insurance money, and the defendant refused to pay, upon the alleged ground that the insured had died from delirium tremens. The agent of the defendant, to whom application was made, stated, that the proofs were not satisfactory that the insured had not come to his death by delirium tremens.

There was no objection to the form or manner of the proofs, or that the plaintiffs had not complied with the by-laws of the company. The objection was, that the company was not satisfied and refused to pay, because the insured had died of delirium tremens—which was excepted by the policy. This refusal to pay the insurance money, based as it was on the alleged ground that the death was such as to exempt the company from any payment at all, was a waiver of the formal proofs required by the by-laws of the company. The court so instructed the jury, and in this we think there was no error.

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The main issue in the case was, whether the insured died of delirium tremens. The evidence was contradictory, but the case was fairly submitted to the jury on proper instructions. Each party asked instructions presenting their views of the case on this point, which were given, and we see no reason for disturbing the verdict which was for the plaintiff.

Judgment affirmed; all the judges concur.

—o—

F. J. CORPENNY, Respondent, vs. CITY OF SEDALIA, Appellant.

1. *Practice, civil—Insufficient pleading—Motion in arrest, etc.*—Where enough can be gleaned from a petition to show that plaintiff has a cause of action, a motion in arrest, on the score of insufficient statement, will be overruled.
2. *Venue, change of—Notice, what necessary.*—The “reasonable notice” of application for change of venue, required by the statute, (Wagn. Stat., 1856, § 4) is not necessarily the five days’ notice prescribed by the General Statute touching service of notices. (Wagn. Stat., 1910, § 25.) The latter section was intended to furnish nothing more than a general rule for the guidance of the trial courts, and was never intended to be of universal application, or absolute and inflexible in its character.
3. *Venue, change of—Affidavit sworn to by city attorney, when proper.*—The affidavit attached to the petition of a municipality for change of venue, is properly sworn to by the city attorney rather than by the mayor.
4. *Venue, change of—Application for—Proof not necessary, when.*—Where an application for change of venue is made after answer filed, on the ground that the cause for such change arose or became known to deponent after the filing, if the application complies with the statute, (Wagn. Stat., 1855-6, § 2) as to its recitals and verifications, it is sufficient to establish a *prima facie* right to the order. The applicant is not compelled to follow the statute literally, and establish by evidence *aliiunde*, the facts sworn to.

Appeal from Pettis Circuit Court.

Draffin & Williams, for Appellant.

Snoddy & Bridges and Phillips & Vest, for Respondent.

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SHERWOOD, Judge, delivered the opinion of the court.

The plaintiff alleged in his petition, that he was the owner of a certain lot in the city of Sedalia, and had built on said lot a large two-story brick business house, with a large cellar thereunder, in accordance with the established grade, but that the city had so negligently constructed a drain or sewer, as to flood the premises of plaintiff, and fill his cellar with the waters collected from all portions of the city, greatly injuring his building, and reducing the rents below the sum for which it had formerly rented, &c., &c. This petition is very artificially drawn, but enough, I think, can be gleaned from its allegations to show that plaintiff has a cause of action. The motion in arrest, based on the alleged insufficiency of the petition, was, therefore properly overruled.

But the question to which the counsel have chiefly directed their attention in argument, is whether there was error in the refusal to grant the defendant a change of venue. It appears from the record, that the parties had announced themselves ready for trial on Saturday, and a portion of the jurors were sworn and examined, but owing to a lack of time to complete the panel on that day, the cause was continued for further proceedings until the following Monday, at which time, and as soon as the court opened, and while the jury was being called, the defendant made application for the change above referred to, based on the alleged prejudice of the judge, and the alleged undue influence which the plaintiff had over his mind. The application also set forth that the knowledge of these matters first came to the defendant since the adjournment of the court on the preceding Saturday, and was verified by the affidavit of the city attorney to the effect that the petition was true, and that he had good cause to believe that the defendant could not have a fair trial, on account of the causes therein alleged. The bill of exceptions does not recite the reasons which moved the court to overrule the application, but it is not unworthy of remark that the record entry, which sets forth that the application was overruled, is not confined to that statement, as

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is usual in entries of that character, but proceeds to set forth the grounds upon which such action was based, which were: want of notice to the plaintiff; that the application was irregular, and that the same was not made in good faith, but for delay. And yet it does not appear, either from the record entry referred to, nor from the bill of exceptions, that plaintiff offered any resistance to the granting of the application on account of the lack of notice of its intended presentation or because of its defects in any other particular.

The defendant, upon the refusal of the application, abandoned the cause at that point, and tendered its exceptions. The panel of jurors was then completed in the absence of the defendant, and a trial had, resulting in a verdict for the plaintiff. Our statute respecting notices, provides that ("unless otherwise provided by law") they shall be served at least five days prior to the time "appointed for the hearing of the motion, pleading or other proceeding." (Wagn. Stat., §§ 22, 25, p. 1010.)

As no different manner is prescribed in the act concerning venue, it is presumed that when it refers to "reasonable notice," as a pre-requisite in granting the change, that reference is thereby intended to the general law on the subject of notices and their proper methods of service. But I am very unwilling to believe that that provision of the statute was ever designed to furnish anything more than a general rule for the guidance of the trial courts, or was ever intended to be of universal application, or absolute and inflexible in its character. Our statute also contains a provision, that "motions in a cause filed in term, shall be filed at least one day before they may be argued or determined." And yet, in *Curtis vs. Curtis*, (54 Mo., 351) where a motion was filed, heard and determined on the last day of the term, it was held no error, this court remarking that, "it is not thought that the statute designs to furnish, in this regard, anything more than a general rule, which must yield when the necessity of the case is so great as to demand it."

In *Reed vs. The State*, (11 Mo., 380) the sole ground upon which a reversal of the judgment of the court below was had-

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was the refusal to grant the defendant a change of venue. His first application therefor, was filed on the 23rd of September, and the prejudice of the judge was alleged as the cause. This application being overruled five weeks thereafter, and on the day of the trial, he gave the prosecuting attorney written notice, and immediately renewed his former application, based on the same ground as before, amplified by the allegation that since his first application he had become more convinced of the judge's prejudice, and further alleging that the knowledge of such prejudice first came to him on the day of his former application. And this court in that case held that the filing of the first application, although overruled, was of itself notice.

Under the circumstances of the case at bar, inasmuch as Sunday intervened, and as the application was made and filed as soon as the court opened on Monday morning, I do not regard the application as deficient in point of time, or because of lack of a written notice. To hold that a party should in every case notify his adversary beforehand, of his intended application, would be equivalent to saying that when the information which would authorize a change of venue, came too late to give such notice, the party who received it, would, without any fault on his part, be debarred from having his cause tried in a court where no pre-conceived bias would operate against him, and tend to his defeat.

It would seem that a court against whom so grave a charge as that of partiality is made, (however frivolous or false the charge might be deemed) would gladly avail itself of an opportunity to be freed from trying a cause, the trial of which might be connected with such a serious imputation.

There is no force in the objection that the affidavit was sworn to by the city attorney, and not by the mayor or other chief officers. Although it is true that the service of a writ of summons must be had on the chief officer of the corporation, yet this results from the express statutory provision, and it by no means follows, that he is the proper person to make an affidavit of the character now being considered. But on the con-

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trary, the city attorney, who may well be supposed to be conversant with all the litigated cases to which the city is a party, would most naturally be regarded as the fittest person to make the requisite affidavit. As a corporation can only act through its agents, and as the statute does not otherwise provide, no reason is perceived why at least the same validity should not attend the act of the city attorney, as that of the mayor, in this regard. It will be found, on examination, of the cases cited by respondent on this point, that they either do not sustain views contrary to those above expressed, or that the reasons therefor are based on some local law. But it is insisted that "the defendant must allege in his application, and show to the satisfaction of the court, that such cause arose, or that he came to the knowledge of such cause since, etc.

If this section is to receive a literal construction, it amounts to a total prohibition of the right to have a change of venue awarded in any case whatsoever, and leaves the applicant dependent on the caprice of the judge. For it would be simply impossible, in a case like the present, to prove a negative—to establish by witnesses, however numerous or credible, that they knew that the applicant did not know of a given fact at or before a certain time. Such a construction would be at variance with, and repugnant to, the evident object and intent of the statute, and make changes of venue matters of favor, instead of matters of right.

The application, when it complies with the provisions of the statute, both as to its recitals and verification, must be regarded as sufficient. When this is done, a *prima facie* basis at least, is laid, whereon to ground the order for the change applied for. And it is not thought that the statute under consideration, intended that the court should be "satisfied" but in the manner above indicated.

For these reasons the judgment is reversed, and the cause remanded; all the judges concur.

Harriman, et al. v. Stowe.

MAGGIE M. HARRIMAN, et al., Respondents, vs. ASA M. STOWE,
Appellant.

1. *Witnesses—Testimony of wife when substantially a party—Constr. stat.*—Section 5 of the Witness Act (Wagn. Stat., 1872-3,) does not preclude the wife from testifying where she is a substantial party to the suit.
2. *Suit for damages—Subsequent declarations, when res gestæ.*—In suit to recover for injuries, where the casualties and declarations touching the same formed connecting circumstances, although some little time may have intervened between them, the declarations are admissible as part of the *res gestæ*.
3. *Agent—Principal responsible for negligence of, when.*—The principle is well settled that where an agent is employed to perform or superintend work, the principal is responsible to third persons for injuries caused by the neglect or nonfeasance of the agent in doing his work. And this principle obtains, though the agent exceeds his powers or disobeys his instructions, provided he does the act in the course of his employment.
4. *Agent, liability of, to third party for misfeasance.*—In a case of positive misfeasance, and not mere omission of duty, on the part of an agent or employee, he will be directly liable to a third party for injuries resulting therefrom. Thus where an agent undertook to build a trap-door, but did the work so negligently as to cause the injury complained of, action would lie by the injured party not only against the principal but the agent also.

Appeal from Jackson Circuit Court.

Karnes & Ess, for Appellant.

I. In the case of Brownell vs. The Pacific R.R.Co., (47 Mo. 239) the declaration was made "immediately after the accident." In this case the declarations were not made for several hours after, and there are "no connecting circumstances" of any kind whatever. We understand the law to be, that the *res gestæ* are first, the statement of the cause of the injury, made by the party almost contemporaneously with its occurrence. Second, those relating to the consequences or results of the injury, and which may be made at any time while such consequences exist. (Ins. Co. vs. Moseley, 8 Wall. [U. S.], 397; King vs. Foster, 6 Car. & P., 325; Thompson vs. Trevanian Skin., 402; Hanover R. R. Co. vs. Coyle, 55 Penn. St. 402.)

II. An action for negligence cannot be maintained against an agent, when the negligence consists in the omission of a duty imposed. (Henshaw vs. Noble, 7 Ohio St., 226; Colvin vs. Holbrook, 2 Comst., 126; Comeron vs. Reynolds, 1 Cowp.,

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406; Denny vs. Manhattan Co., 2 Denio, 115; Montgomery Co. Bank vs. Albany City Bank, 3 Selden, 464.) There was no privity between appellant and respondents, and for a neglect of duty he was only answerable to his employer. The maxim in such cases is *respondeat superior*. (Black Stock vs. New York & Erie R. R. Co., 20 N. Y., 51; Sto. Ag., § 309.)

Johnson & Botsford, for Respondents.

I. The testimony of Mrs. Harriman was erroneously excluded, (Tingley vs. Cowgill, 48 Mo., 291; Fugate vs. Pierce, 49 Mo., 441,) but this was done at the instance of defendant.

II. It could not have been more than three hours, and may have been but a few minutes, from the time she was injured, to the time when she made the statement complained of, to her physician. The statements thus made as to the cause of her injuries, were clearly a part of the *res gestæ*. (Brownell vs. Pacific R. R., 47 Mo., 239; State vs. Sloan, 46 Mo., 604; Ins. Co. vs. Moseley, 8 Wall., 397; Comm. vs. McPike, 3 Cush., 181; Comfort vs. The People, 54 Ill., 404.)

III. For an act of negligence producing an injury to a third party, both the principal and agent are liable, and may be sued either jointly or severally. (Wright vs. Wilcox, 19 Wend., 343; Montfort vs. Hughes, 3 D. Smith, 591; Snyder vs. Moore, 8 Barb., 358; Hewitt vs. Swift, 10 Am. Law Reg. 505; Phelps vs. Wait, 30 N. Y., 78; Witte vs. Hague, 2 Dow. & Ryl., 33; Shearm. & Redf., Neg., § 112.)

WAGNER, Judge, delivered the opinion of the court.

The plaintiff, a married woman, in conjunction with her husband, brought this action for damages against the defendant for injuries sustained by her in falling through a hatchway which, it was alleged, was constructed by defendant, and by him negligently, carelessly and wrongfully left insecure and unprotected.

The answer denied the allegation of negligence, and as a further defense, set up that the house where the hatchway

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was built was the property of defendant's wife, and that defendant in doing the work was acting as her agent. There was a replication as to negligence and carelessness, but it was admitted that the property belonged to defendant's wife.

The verdict and judgment were for plaintiff, and defendant appealed. Upon the trial, the plaintiff, Mrs. Harriman, was offered as a witness and excluded by the court. As she was the substantial party in the case under the statute, she was a competent witness, and the ruling of the court was erroneous. (*Tingley vs. Cowgill*, 48 Mo., 291; *Fugate vs. Pierce*, 49 Mo., 441.) But the plaintiff is not here as a complainant, and if the judgment is affirmed the error does not injure her. On the trial, E. W. Shauffler was sworn as a witness for the plaintiff, and stated that he was a practicing physician, and as such attended on the plaintiff. The defendant objected to his giving any testimony because under the statute he was incompetent. This objection was overruled.

The witness was then asked to state in what condition he found the plaintiff when he was called in. This question was objected to by the defendant for the same reason as above given. The court sustained the objection, but permitted the witness to answer under the following restriction: "In answering the question you will not reveal any information you may have received from the plaintiff while attending her in your professional character, which information was necessary to enable you to prescribe for her as a patient in your capacity as physician or surgeon." The witness then gave testimony tending to show that plaintiff was injured about noon, what her injuries were, that he was her physician before that time and that he was called to see her between one and four o'clock of that day. At the same time she stated to him that the trap-door in the kitchen had been left in an insecure condition, and that she stepped on it and fell through.

The statute says that a "physician or surgeon" shall be incompetent to testify, "concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary

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to enable him to prescribe for such patient as a physician or do any act for him as a surgeon." (2 Wagn. Stat., p. 1374, § 8.) As the court restricted the witness from giving any information forbidden by the statute, the only inquiry is, whether the evidence was admissible on any other principle. The general rule is, that evidence in order to become a part of the *res gestæ* should consist of declarations made contemporaneously, or nearly so, with the main event by which it is alleged that the principle transaction occurred. (Brownell vs. Pacific R. R. Co., 47 Mo., 239.)

But in the Insurance Co. vs. Moseley (8 Wall., 397) where the question was carefully and ably considered, it was declared that though generally the declarations must be contemporaneous with the event, yet where there are any connecting circumstances they may, even when made some time afterward, form a part of the whole *res gestæ*.

So in the Commonwealth vs. McPike, (3 Cush., 181) the indictment was for manslaughter, the defendant being charged with killing his wife.

It appeared that the deceased ran up stairs from her own room in the night, bleeding and crying "murder! Another woman, into whose room she was admitted, went at her request for a physician. A third person, who heard her cries, went for a watchman, and on his return proceeded to the room where she was. He found her on the floor bleeding. She said the defendant had stabbed her. The defendant's counsel objected to the admission of this declaration in evidence. The objection was overruled. The court decided that the evidence was properly admitted. It was said that it was of the nature of *res gestæ*. It will be observed that the declarations were not contemporaneous, but that considerable time must have elapsed between the time when the act was committed and that when the declarations were made; but the screams of the injured woman, her running into another room, her being found bleeding upon the return of the person who went for the watchman, all formed connecting links and rendered the declarations equally as satisfactory as if they

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had been made at the time the wounds were given. In the present case the witness came within a short time after the plaintiff received the injuries. He found her suffering, and she told him how she was hurt, namely, by falling through the trap door.

The accident and the declarations formed connecting circumstances, and in the ordinary affairs of life no one would doubt the truth of these declarations or hesitate to credit them as evidence. I can perceive no valid objection to their admissibility.

The instructions given by the court submitted the case with unquestionable fairness. For the defendant the court declared the law as follows:

First. Before the jury can find for the plaintiffs it devolves on the plaintiffs to prove that the defendant constructed the trap-door and hatchway mentioned in plaintiffs' petition, carelessly, negligently and unskillfully, or so left it; and that Maggie M. Harriman, the plaintiff, fell through the trap-door and hatchway, and that such falling was occasioned by the careless, negligent and unskillful construction of said trap-door and hatchway by the defendant, or by so leaving it.

Second. If the jury believe from the evidence that the defendant, in the construction of said hatchway and trap-door and in leaving it, exercised such care as an ordinarily prudent man would exercise, in doing similar work, to prevent injuries to persons passing over the same, then they will find for the defendant; and it devolves on the plaintiffs to prove that defendant failed to exercise such care.

These instructions were sufficiently favorable to the defendant, and there is nothing in those given by the court on the part of the plaintiff which in anywise conflicts with or militates against them.

But it is urged with great pertinacity here that the defendant, in doing the work, was acting as the agent of another, and that, therefore, he is responsible to his principal only and not to the plaintiff.

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The well settled principle of law is, that where an agent is employed to perform or superintend work, the principal is responsible to third persons for injuries caused by the neglect or non-feasance of the agent in doing the work. (Morgan vs. Bowman, 22 Mo., 538.) And this principle obtains, though the agent exceeds his powers or disobeys his instructions, provided he does the act in the course of his employment. (Douglas vs. Stephens, 18 Mo., 362; Minter vs. Pacific Railroad, 41 Mo., 503; Garretzen vs. Duenckle, 50 Mo., 104.)

In such cases the doctrine of *respondeat superior* applies, and the liability is cast upon the master who employed the agent and caused the work to be done. (Barry vs. St. Louis, 17 Mo., 121; Clark vs. H. & St. Jo R. R., 36 Mo., 202.)

Judge Story says the distinction ordinarily taken, is between acts of mis-feasance, or positive wrongs, and non-feasance, or mere omissions of duty by private agents. The law on this subject as to principals and agents, is founded upon the same analogies as exist in the case of masters and servants. The master is always liable to third persons for the mis-feasances and negligences and omissions of duty of his servant, in all cases within the scope of his employment. So the principal in like manner, is liable to third persons for the like mis-feasances, negligences and omissions of duty of his agent, leaving him to his remedy over against the agent in all cases where the tort is of such a nature that he is entitled to compensation. The agent is personally liable to third persons, for his own mis-feasances and positive wrongs, but he is not in general liable to third persons for his own non-feasances or omissions of duty, in the course of his employment. His liability in these latter cases, is solely to his principal, there being no privity between him and such third persons; and the privity exists only between him and his principal. Therefore, the general maxim as to all such negligences and omissions of duty is, in cases of private agency, *respondeat superior*, (Story on Agency, § 308) and such is the general doctrine. (2 Kent Com., 10 Ed., 878, note; Pars. Cont., 5 Ed., 66; Calvini vs. Holbrook, 2 Comst., 126; Denny vs. Manhattan Co., 2 Denio, 118; 1 Bl. Com., 413.)

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The true distinction, as stated by Story, is between acts of misfeasance, or positive wrongs, and non-feasance, or mere omissions of duty. In the latter case, the master or principal is alone liable to third persons; whilst in the former, the responsibility rests upon both the principal and agent.) Thus, in Wright vs. Wilcox, (19 Wend., 343) Cowen, J., speaking for the court, says: "In a case of strict negligence by a servant, while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence, at the same time and under the same circumstances; the servant in fact, and the master constructively, by the servant, his agent." Lord Holt, in his celebrated judgment in Lane vs. Colton, (12 Mod. 488; S. C., Ld. Raymond, 646, 655,) says that for the neglect of the servant, third persons can have no remedy against him, but that the master is alone chargeable; but for a misfeasance, or actual tort, an action will lie against the servant, because he is a wrong-doer. The same views are confirmed in numerous adjudged cases. (Cary vs. Webster, 1 Strange, 480; Montfort vs. Hughes, 3 E. D. Smith, 591; Suydam vs. Moore, 8 Barb., 358; Phelps vs. Wait, 30 N. Y., 78.)

The present case seems to be one, not of mere non-feasance or omission, but of strict negligence or wrong. The agent undertook and proceeded to build the trap-door, but did it so negligently as to cause the injury; under such circumstances the action would be maintainable against the agent and the principal also.) The answer states, and the pleadings admit, that the house, upon which the work was done, was the property of defendant's wife, and that he was acting as her agent. But it is not averred, nor does the case anywhere show, that it was her separate estate. If she simply owned the fee simple, as is inferable from the pleading, then the defendant, in constructing the trap-door, was acting for himself as well as for his wife, for the uses, rents and profits of the wife's realty belong to the husband during coverture.

Under any view that we can take of the case, we think that the action was properly brought, that the judgment was right and should be affirmed; the other judges concur.

German Savings Association v. Helmrick, et al.

GERMAN SAVINGS ASSOCIATION, Plaintiff in Error, vs. H. HELMRICK, et al., Defendants in Error.



1. *Prom. notes—Extension—Surety, when held.*—An extension of time for a definite period was granted to the principal maker of a note without the consent of the surety, and the contract for extension was indorsed on the back of the note. Surety held released.

Lay & Belch and Brown & Case, for Plaintiff in Error.

I. The name of Ward appears on the face of the note as a joint maker, and it was not competent for him to show that he signed it in a different capacity, or that he assumed a different liability. (Sto. Prom. notes, § 421, p. 564; Schriver vs. Lovejoy, 32 Cal., 574; Hull vs. Porter, 27 Ills., 312; Derry Bank vs. Baldwin, 41 N. H., 434; Sweet vs. McAllister, 4 Allen, [Mass.] 353; Wright vs. Morse, 9 Gray, 337; Exeter Bank vs. Stowell, 16 N. H., 61; Heath vs. Derry Bank, 44 N. H., 174; Drake vs. Markle, 21 Ind., 433; Draper vs. Weld, 13 Gray, 580; 20 N. Y., [Ct. of App.], 240.)

II. The original notes being past due, and defendant, Ward, liable thereon by protest and notice, when the new notes were executed by all parties as makers, and the old ones surrendered, this was a payment and not a renewal of the old notes, and defendants were all principal debtors on the notes sued on. (White vs. Van Horn, 19 Iowa, 189.) And Ward could have at once sued Helmrick & Co., for indemnity. (Wilkinson vs. Stewart, 30 Ill., 48.)

III. A surety is not released by an extension of time to the principal debtor, unless his hands are thereby tied so that he cannot sue. An agreement not to sue on a claim presents no bar to an action on it. (Atwood vs. Lewis, 6 Mo., 392; Bond vs. Worley, 26 Mo., 253; Bridge vs. Tierman, 36 Mo., 439; Rucker vs. Robinson, 38 Mo., 154.)

F. M. Black and W. P. Wade, for Defendants in Error.

I. An agreement between the creditor and principal debtor to extend the time of payment, without the assent of the surety, will discharge the surety. (Dodd vs. Winn, 27 Mo., Mo. 501; Smith vs. Rice, 27 Mo., 505; Smarr vs. Schnitter, 38 Mo., 478; Rucker vs. Robinson, 38 Mo., 154.)

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NAPTON, Judge, delivered the opinion of the court.

This suit is upon three notes, one of which is as follows:

Kansas City, Mo., Feb. 28th, 1870.

"Sixty days after date we promise to pay to the order of H. Helmrick, & Co., four hundred and fifty dollars at the banking office of the German Savings Association, with ten per cent. interest per annum from maturity, until paid; value received.

Signed

H. Helmrick & Co.

James M. Ward.

Marked: Extended July 1st, due Ap'l 29th, and May 2nd.

The defendant, Ward, sets up as a defense that he was surety, and that plaintiff gave time to the principal—by which the surety was released.

The three notes sued on were, it appears, given in lieu of other notes made by Helmrick & Co., on which Ward was indorser, and after the notes had fallen due and been protested and due notice had been given to Ward.

The new notes were drawn up by the cashier in a shape which he supposed would make Ward principal, and preclude him from setting up his suretyship. And when these notes fell due, an extension of time of sixty days was given to Helmrick without consultation with Ward, and this extension was made on payment by Helmrick of part of the principal and all the interest, and was for a definite period. As the law now stands, the plea was a good one, as the extension was for a definite period and made without the consent of the surety, and being reduced to writing on the back of the notes precluded the plaintiff from suing, until the expiration of the sixty days. It is useless to recite the instructions.

The judgment must be affirmed; the other judges concur.

State v. Carlisle.

STATE OF MISSOURI, Defendant in Error, *vs.* JOHN T. CARLISLE.
Plaintiff in Error.

1. *Practice, criminal—Separation of jury—Effect of.*—The separation of a jury in a criminal cause, will not vitiate the verdict, unless it further appear that they have been tampered with, or have been guilty of some improper conduct.
2. *Evidence—Confession made while in charge of an officer—When admissible.*—The mere fact that a prisoner is in charge of an officer at the time a statement or confession is made, is not sufficient to render the same inadmissible in evidence. It must further appear that it was induced by hope, on the one hand, or by fear or intimidation on the other.
3. *Evidence—Deposition—Signature of witness—What sufficient.*—Where, from any cause, a deponent is unable to sign his own name, his signature written by another, at his request, is, in effect, a signing by himself, and is a sufficient compliance with the statute. (Wagn. Stat., 1078, § 25.)
4. *Evidence—Admissions—Other statements must be taken in connection with.*—To entitle admissions to be received in evidence, they must be taken together with all that was said at the same time and place, whether the remainder be against or for the person making them. But it is for the jury to attach what credit they see proper to the different statements, or parts of statements, both *pro* and *con*.

*Error to Saline Circuit Court.**Jno. P. Strother*, for Plaintiff in Error.

I. The court erred in admitting the statement of Wecker, taken in the preliminary examination, for it was not signed by him, and we have only the statement. The court erred in allowing the jury to separate. Whitney *vs.* State, (8 Mo., 165) was a larceny, not a murder case. In State *vs.* Burns, (33 Mo., 483) the jury had already found a verdict before they separated, and then only one left. This case was also larceny, and the court blindly followed Whitney *vs.* State, without argument. But in neither of those cases, was there any such separation as in this. Here the jury are allowed for two days and nights to roam about town, when the very air was pestilential with prejudice and invective against a man on trial for his life. It is time the Circuit Court were taught that this cannot be tolerated. The prisoner is afraid to object to a separation, because that would at once prejudice the mind of the jury against him.

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H. Clay Ewing and S. J. Davis, for Defendant in Error.

I. It is the settled law of this State, that the mere separation of the jury in a criminal case—without proof of misconduct or of the fact that they have been tampered with—is no ground for new trial in the Circuit Court, or for reversal in the Supreme Court. (See *State vs. Harlow*, 21 Mo., 446; *State vs. Igo*, 21 Mo., 459; *State vs. Brannon*, 45 Mo., 329; *State vs. Matrassey*, 47 Mo., 295; *Compton vs. Arnold*, 54 Mo., 149; *State vs. Barton*, 19 Mo., 227; *Whitney vs. State*, 8 Mo., 165; *State vs. Mix*, 15 Mo., 153.)

II. The mere fact that the prisoner was in the custody of an officer, makes no difference, when no undue influence is used. (*State vs. Simon*, 50 Mo., 370; *Green vs. State*, 13 Mo., 382; *State vs. Martin*, 28 Mo., 530.)

III. The statements made by the prisoner in this case are not confessions of guilt, but statements made in denial of guilt, and the only rule in such cases is, that the whole statement should go to the jury. (See instructions in *Green vs. State*, 13 Mo., 382.)

IV. The statement made by the deceased, before the committing magistrate, in the presence of the prisoner, was admissible as evidence on the trial. (See *State vs. McO'Blennis*, 24 Mo., 402; *State vs. Baker*, 24 Mo., 437; *State vs. Houser*, 26 Mo., 431; *State vs. Harman*, 27 Mo., 120.)

The law does not require such statements to be signed by the witness. (*Wagn. Stat.*, 1077, § 18; *Rex vs. Flemming*, 2 *Leach's Cr. Cas.*, 3 Ed., p. 996; *Rex vs. Osborn*, 8 *Car. & P.*, 113; *Cofmm. vs. Richards*, 18 *Pick.*, 434.)

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted for killing Geo. Wecker, and was convicted of murder in the first degree. The evidence against him was mainly circumstantial, but it formed a chain which unquestionably supports the verdict, and as the facts were for the jury, we have only to see whether the court ruled correctly on points of law.

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One of the principal objections raised is; that the court permitted the jury to separate after they were impaneled, and whilst the evidence was being introduced. The evidence shows that this separation was consented to by both parties, and it is not in anywise shown that the jury were guilty of any misconduct, or that they were in the slightest degree tampered with. The rule has been consistently acted upon in this State that a mere separation of the jury will not vitiate a verdict, unless it is made to appear that the jury has been tampered with; or that they have been guilty of some improper conduct. (Whitney vs. State, 8 Mo., 165; State vs. Mix, 15 Mo., 153; State vs. Barton, 19 Mo., 227; State vs. Harlow, 21 Mo., 446; State vs. Igo, *Id.*, 459; State vs. Bran-
non, 45 Mo., 329; State vs. Matrassey, 47 Mo., 295.)

In the case of the State vs. Igo, *supra*, Leonard, J., in delivering the opinion of the court, after referring to various cases holding that a separation of the jury will not render a verdict bad in the absence of misconduct, remarks: "This court has heretofore acted on the principle, and we are not disposed to depart from it. * * * Indeed, we think, no other rule could be adopted upon the subject consistent with a proper and efficient administration of the law. When the verdict is such as the court thinks ought to have been rendered upon the law and evidence, and no improper influence has been exerted in any manner over the jury, nor any just grounds for suspecting any such influence, it would seem to be but trifling with the administration of the criminal law of the land, to set aside a verdict upon the mere possibility that the jury may have been improperly influenced."

As the court can set aside a verdict when it is contrary to either the law or the evidence, the rule established is certainly the best for the administration of criminal justice.

It is insisted that the court committed error in permitting one Phillips, who was deputy constable, and who had the prisoner in custody, to give evidence of certain statements made by the prisoner. But the evidence is positive and pointed that no threats or inducements whatever were made

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by the officer or held out to the prisoner, and whatever statements were made were merely voluntary. The mere fact that a prisoner was in charge of an officer at the time a statement or confession was made, is not sufficient to render the same inadmissible in evidence; but it must further appear that it was made or induced by the flattery of hope, or extorted by fear or intimidation. (State vs. Simon, 50 Mo., 370.) As there was an utter absence of any influence whatever, calling forth or inducing the statement, the evidence was clearly admissible.

On the trial the State offered in evidence the testimony of Wecker, the deceased, taken upon the preliminary examination before a magistrate. This was objected to because it was not signed by the witness.

The objection was overruled and the testimony was admitted. The record shows that the witness' name was signed to the evidence by another person, at witness' request, he being too weak to sign the same. I am inclined to the opinion that this would be a sufficient signing. When a person is unable from any cause to write his own name, and requests another to do it for him, and in his stead, this is a signing by himself. The statute (2 Wagn. Stat., p. 1078, § 25) declares, that the evidence given by the several witnesses examined shall be reduced to writing by the magistrate, or under his direction, and be signed by the witnesses respectively. But this signing is to be done in the usual way. A manual signing by the witness himself is not an absolute requisite, when it is shown to be a physical impossibility. In case the witness does not know how to write, or his arm is disabled, or from any cause he does not possess the ability to perform the act, he may request another to do it for him, and that will be sufficient. That the evidence was admissible is conclusively established by the former decisions of this court. (State vs. McO'Blennis, 24 Mo., 402; State vs. Baker, Id., 437.)

The certificate of the committing magistrate clearly shows that defendant was present when the examination was had

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and the testimony taken, and the court therefore ruled correctly when it refused to exclude it.

The counsel for the defendant objects to the action of the court, in giving the second instruction asked for by the State, and in refusing to give the third instruction presented by the defendant.

The second instruction given for the State, was as follows: "In considering what the defendant said after the fatal act, the jury must consider it all together. He is entitled to the benefit of what he said for himself, if true, as is the State to the benefit of anything he said against himself, in any conversation proved by the State. What he said against himself, the law presumes to be true, because against himself. But what he said for himself, the jury are not bound to believe because said in a conversation proved by the State. They may believe it or disbelieve it, as it may be shown to be true or false, by the evidence in the case." This instruction, though somewhat amplified, is the same, in substance, as the one given in the case of Green vs. The State, (13 Mo., 381.) and approved by this court. Though it is generally true that a party's admissions against himself are true, else he would not make them; yet to entitle them to be received in evidence, they must all be taken together, as well the part that is for him, as that which is against him. For though some part may contain matter favorable to the party, and the object is only to ascertain that which he has conceded against himself—for it is to this only that the reason for admitting his own declaration applies, namely, the great probability that they are true—yet, unless the whole is received and considered, the true meaning and import of the part which is good evidence against him, cannot be ascertained. But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, yet it does not follow that all the parts of the statement are to be regarded as equally worthy of credit; but it is for the jury to consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in

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his own favor, as those made against him. (1 Greenl., § 201.) The instruction, though liable to some verbal criticism, was in substance correct.

The third instruction which, it is contended, the court erred in not giving for the defendant, told the jury that, "all the facts established in evidence, must be consistent with the theory of defendant's guilt, in order to conviction, and if they are not so, the jury must acquit." The court had already instructed the jury, at defendant's request, "that, in order to convict the defendant upon circumstantial evidence alone, the circumstances tending to show his guilt, should be established beyond a rational doubt, by the evidence in the cause, and when established, should point so strongly to the guilt of the defendant as to exclude any other reasonable hypothesis." After the giving of this instruction, we are unable to perceive any necessity, or even propriety, in giving the one refused. The one given was clear and explicit, and covered the whole law, and the one refused was entirely unnecessary.

A careful examination of the whole record, and of all the points raised, has fully convinced us that there is no error justifying an interference, on our part, with the judgment, and it must therefore, be affirmed. All the judges concur.

EUGENE LUNGSTRASS Respondent, *vs.* GERMAN INSURANCE CO.
Appellant.

1. *Corporation—Officer of, exceeding his powers, company bound, when.*—It is well settled that where a person deals with an officer of a corporation who assumes authority to act in the premises, and no irregularity or want of authority is brought to the knowledge of the party so dealing, and nothing occurs to excite suspicion of such defect, the corporation is bound, although the agent exceeded his powers.
2. *Fire Insurance Companies—Premium—Receipt of by agent—Entry on books—Contract, what acts close.*—Where the agent of a fire insurance company accepts a policy sent him by it and charges himself on his agency books with the premium, the contract between him and the company is consummated although neither the premium nor a letter of acceptance is forwarded by him to his principal.

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*Appeal from Lafayette Circuit Court.**Crandell & Sinnett, for Appellant.*

I. The acts and declarations of the agent when not expressly authorized by the principal, must, in order to bind him, be within the scope of the authority conferred on him. (Sto. Ag., §§ 115, 126 to 134; N. Y. Life Ins. & Trust Co. vs. Beebe, 3 Seld. [N. Y.] 364.)

Hicks, Philips & Vest, for Respondent.

In this case the question is not what were the powers conferred upon the secretary by the company, but what authority Lungstrass, who dealt and corresponded with him and him only, had a right to infer the Secretary had from the Company. (Perkins vs. Washington Ins. Co., 4 Cowp., 660, 661, 663; New Eng. Ins. Co. vs. DeWolf, 8 Pick., 59, 62, 63; Goodwin vs. Union Screw Co., 34 N. H., 378; Northrup vs. Miss. Valley Ins. Co., 47 Mo., 440; Merchants Bank vs. State Bank, 10 Wall., 644; See 15 Md., 494, 501; Nicoll vs. Am. Ins. Co., 3 Woodb. & Min., 529; Hough vs. City Fire Ins. Co., 29 Conn., 10; Aetna Ins. Co. vs. Maguire, 51 Ill., 350, 351.)

NAPTON, Judge, delivered the opinion of the court.

This case was before this court in 1871, and is reported in Vol. 48, p. 201, and we refer to the statement therein made as sufficient to explain the points arising.

It is true that on the second trial, had after the decision of this court, there was some additional evidence, but the material facts are the same as before; and the instructions given on the last trial are in conformity with the principles determined when the case was here in 1871.

Great stress is laid, however, in the elaborate argument by the counsel for the company, on the instructions given by the court in regard to a certain printed book of a Cincinnati Insurance Company—which, it seems, was handed to the plaintiff, when he was appointed agent by the secretary of defendant, accompanied with the remark, that the defendant

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had not as yet had any book of that kind printed, but that this one would serve to some extent as a guide to him in the management of his agency.

The proof was very distinct on the last trial, that the company had never formally adopted the regulations or instructions contained in said printed book; and therefore it is insisted, that no authority existed in the secretary to use such book in his instructions to agents.

But it is well settled that where persons deal with an officer of a corporation, who assumes authority to act in the premises, and no want of authority or irregularity is brought to the knowledge of the party so dealing with the corporation, and nothing occurs to excite suspicion of such defect, the corporation is bound, although the agent exceeded his powers. (*MERCHANTS BANK VS. THE STATE BANK*, 10 Wall., 644.)

In the present case however, there was no defect of authority on the part of the secretary to appoint agents and give them instructions.

It clearly appeared that he was the officer intrusted with this business. It matters not, therefore, whether the board of directors had ever adopted the regulations handed by the secretary to the plaintiff or not; and the instruction given by the court on this point was correct.

But we think the point entirely immaterial. The correspondence between the secretary and the plaintiff undoubtedly authorized him to pursue the course which he did, in regard to his own policy.

When he accepted the policy last sent to him, and charged himself on his agency book with the premium, the contract was consummated, and the jury, under instructions on this point, have found the facts to be as stated.

This course of the plaintiff was authorized by the correspondence between him and the Secretary, without regard to the printed book of instructions, so that all questions in regard to the effect of that book, and its delivery to the plaintiff were unnecessary to a decision of the case.

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All the points in this case were decided when the case was here before, and we think decided rightly, and it is unnecessary now to do more than refer to the opinion of Judge Bliss on the subject. The judgment is affirmed. All the judges concur.

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JOHN B. DALE, *et al.*, Appellants, *vs.* SOLOMON WRIGHT, Respondent.

1. *Judgment for costs not final.*—A judgment for costs is not a final judgment from which an appeal will lie. (Boggess *vs.* Cox, 48 Mo., 278.)
2. *Notary Public—Certificate—Failure to mention seal—Copy of certificate, etc.*—A notary's certificate is not rendered invalid by reason of the mere fact that it purports to be executed under his "hand and official signature," and that his notarial seal is not mentioned therein, where the seal is attached to the certificate. And in such case, a copy taken from the recorder need not have the impress of the original seal; that may be indicated by a scrawl.

Appeal from Jasper County Court of Common Pleas.

W. H. Phelps, for Appellant, cited Clark *vs.* Rynex, 53 Mo., 380.

H. H. Woodmanson, for Respondent: cited Boggess *vs.* Cox, 48 Mo., 278; Young *vs.* Stonebraker, 33 Mo., 117; 4 Blackf. Ind., 158; Cartmill *vs.* Hopkins, 2 Mo., 220; Boynton *vs.* Reynolds, 3 Mo., 79; Grimsley *vs.* Riley, 5 Mo., 280; Walker *vs.* Keile, 8 Mo., 301; Glasscock *vs.* Glasscock, 8 Mo., 577; Moreau *vs.* Detchemendy, 41 Mo., 431; 1 Wagn. Stat., 274, § 9; *Id.*, 278, § 30; Patterson *vs.* Fagan, 38 Mo., 70.

VORIES, Judge, delivered the opinion of the court.

This action was brought by the plaintiffs, who were husband and wife, to recover the possession of forty acres of land described in the petition, and charged to be the lands of the wife, which, it was alleged, were wrongfully in the possession of the defendants, and withheld from the plaintiffs.

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The petition was in the usual form. The defendant, by his answer, denied the allegations of the petition, and also set up title to the land in himself by virtue of a conveyance from the grantor of the plaintiffs—of which it was charged that the plaintiffs had notice at the time of their purchase of the land, from the same grantor.

The replication denied the defendant's title, and all notice of the same.

The cause was tried before a jury. The plaintiff, amongst other deeds offered in evidence, which were necessary to show a chain of title from the United States to the plaintiff, Sarah T. Dale, after having made the necessary preliminary proof, offered in evidence a certified copy of a deed, certified from the recorder's office of Jasper County, and which purported to convey the land in controversy, from John B. Dale to John Dale.

This evidence was objected to by the defendant, on the ground that the said deed did not appear to have been properly acknowledged as the law directs, and that, therefore, a certified copy could not be read in evidence; that the acknowledgment of the deed was defective in this, that the officer before whom it was made had not mentioned the seal of his office in the body of his certificate, and that no seal of the notary public was attached to his certificate.

The court sustained the objection to the copy of the deed, and excluded it from the evidence in the cause.

To this ruling of the court, the plaintiff excepted.

After the plaintiffs closed their evidence, it being apparent that their title was defective without the help of the excluded deed, the court instructed the jury to find a verdict for the defendant.

The plaintiffs then, by leave of the court, took a non-suit with leave to move to set it aside. This motion was afterwards made and overruled by the court, when the plaintiffs again excepted, and have appealed to this court.

The only question raised or insisted on by the plaintiff in this court, is as to the propriety of the action of the court be-

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low in excluding the certified copy of the deed from John B. Dale to John Dale, for the land in controversy, from the evidence in the cause. The defendant has, however, raised a preliminary question, which will be first considered, and which will dispose of the case, as it now stands before this court.

It is insisted by the defendant, that no final judgment has ever been rendered in the cause, from which an appeal would lie. The only judgment rendered in the cause by the common pleas court, is a judgment for costs against the plaintiff.

When the plaintiff took a non-suit, the following entry appears: "It is therefore considered and adjudged by the court, that the defendant have and recover of and from the plaintiff, his costs in this behalf laid out and expended." This is the only judgment appearing in the record.

The exact question involved in this case was decided by this court in the case of Boggess vs. Cox, (48 Mo., 278). It was there held, that a judgment, in all of its particulars similar to the judgment in this case, was not a final judgment from which an appeal could be taken, and although we dislike to dispose of cases in this court on points not going to the real merits of the cause, we can see no reason why we should depart from the decision in that case. The appeal must therefore be dismissed. Inasmuch, however, as the judgment may be corrected after the appeal is dismissed, and the case again brought here to be decided on the question presented by the plaintiff, we deem it advisable to express the opinion of this court at this time, in reference to the exclusion of the deed offered in evidence by the plaintiff.

The certified copy of this deed was objected to—because it was defectively acknowledged in this: "That the pretended officer had not mentioned the seal of his office, in the body of his certificate, and that no seal of said pretended notary public was attached to the certificate of the officer.

The certificate of acknowledgment was as follows:

"STATE OF TEXAS, }
COUNTY OF FANNIN. }

Before me, Robert S. Cox, a Notary Public, in and for the said county of Fannin, personally came John B. Dale, the

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grantor in the foregoing deed, to me well known, and acknowledged that he executed the foregoing deed, for the purposes and consideration therein contained.

In testimony whereof, I have hereunto set my hand and official signature, this 26th day of March, 1870.

{
SEAL.
}

ROBERT COX.
Notary Public.

The form of this acknowledgment is in substantial conformity to the statute, and if the notarial seal was attached to the certificate, it was not necessary that the certificate should purport to be under seal, or that it should be stated in the body of the certificate, that it was executed under the seal of the notary. Where a deed is executed by a party, and a scrawl substituted for a seal, then the statute requires that the instrument or deed should purport to be under seal; but where a seal at common law is used, the deed need not further purport to be under seal, the seal in such case being sufficient. (1 Wagn. Stat., 1872, p. 269, § 5; Boynton vs. Reynolds, 3 Mo., 57.)

It is insisted by the defendant, that no seal appears to the certificate of the notary to the acknowledgment of the deed, as the same is set forth in the certified copy offered in evidence.

It is true that the real impression made by the notarial seal is not made on the certified copy taken from the record of the deed, and in such case it is impossible that it could so appear either in the copy taken from the record or upon the record itself. All that the recorder can do in recording a deed having the official seal of a notary impressed thereon, is to make some proper entry on the record, indicating the place or situation of the notarial seal, as was done in the present case, and the mere fact that the notary had said that it was executed under his "hand and official signature," in place of his official seal, can make no substantial difference.

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We think that the court improperly excluded the certified copy of the deed. But for the reason that no final judgment appears in the record, the appeal must be dismissed. The other judges concur.

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J. B. HANDLIN Defendant in Error, *vs.* MORGAN COUNTY, Plaintiff in Error.

1. *Support of the poor—Funeral expenses—County not liable for.*—The legislature never intended, by § 6 of the act for the support of the poor, (Wagn. Stat., p. 997-8) that the county should pay the funeral expenses of a man who had sufficient means to bury him at the time of his death, notwithstanding the fact that the administration law might vest all his property in his widow.
2. *Support of the poor—Burial Expenses.*—One who voluntarily buries a poor person, has no legal demand against the county therefor.

Error to Morgan Circuit Court.

Anthony & Reynolds, for Plaintiff in Error.

E. L. Edwards & Son, with W. T. Pemberton, for Defendant in Error: cited *Duval vs. Laclede Co.*, 21 Mo., 396.

ADAMS, Judge, delivered the opinion of the court.

This was a demand presented to the County Court of Morgan County, for an allowance for the burial clothes of one James T. Gorman, who is alleged to have died in that county, without means to pay his funeral expenses. The County Court refused to allow the demand, and the plaintiff appealed to the Circuit Court. The evidence showed that the burial clothes were of the value of twenty-two dollars; that Gorman had a wife and family, and lived in Morgan county, and died in that county; that a few hours after his death his wife sent to the plaintiff for the burial clothes, and the person who went informed the plaintiff that Gorman had no means to pay for them, and that he must charge them to the county; that plaintiff furnished the clothes, and charged them to the

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county; that Gorman was a stout, able-bodied man, and had property of every kind after his death, as testified to by the probate judge, which was appraised at about two hundred dollars, and consisted of house-hold and kitchen furniture, and other personal property.

Upon this evidence the Circuit Court refused to instruct that the plaintiff was not entitled to recover, but gave instructions at the instance of the plaintiff, to the effect, that if Gorman died and left no property sufficient to pay the plaintiff's demand, he was entitled to recover.

The defendant excepted to these rulings, and the jury having found for the plaintiff, the defendant filed a motion for a new trial, which was overruled, and the plaintiff excepted. A final judgment was rendered in favor of plaintiff, and the defendant has brought the case here by writ of error.

1. The plaintiff bases his right of recovery against the county upon § 6 of the act for the support of the poor, (1 Wagn. Stat., 997) which reads as follows:

“The County Court of the proper county, shall allow such sum as it shall think reasonable, for the funeral expenses of any person who shall die within the county, without means to pay his funeral expenses.”

It is very manifest that the legislature never intended the county should pay the funeral expenses of such persons as had sufficient means to bury them at the time they died. It was certainly contemplated that the widow or family would bury the husband who had left means sufficient for that purpose, notwithstanding the administration law might vest the widow absolutely with the whole of the property so left by him.

Our administration law is very liberal toward the widow. It declares that in addition to dower, she shall be allowed to keep as her absolute property, the family bible and the books not to exceed the value of two hundred dollars; all the wearing apparel of the family; her wheels, looms and other implements of industry; all yarns, cloth and clothing, made up in the family for their own use; all grain, meat, vegetables, groceries and other provisions on hand, and provided and neces-

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ary for the subsistence of the family for twelve months; her household and kitchen furniture, not to exceed the value of five hundred dollars. And in addition to the above, the widow may take such other personal property as she may choose, not to exceed the appraised value of four hundred dollars, for which she shall give a receipt. But the property so selected is exempt from the payment of debts or distribution. (See §§ 33, 35, 36, 1 Wagn. Stat., 88.) This enumeration shows that the widow may thus become invested with property to the amount of more than a thousand dollars, which is exempt from the payment of debts. Was it contemplated, that the husband who died possessed of that amount of property, was to be treated as a pauper, and buried at the expense of the county? Did he die without means sufficient to bury him, within the meaning of the 6th section of the Poor law, above quoted?

2. But in *Duval vs. Laclede County*, (21 Mo., 396) decided at the July Term, 1855, this court gave a judicial construction to the 6th section of the act for the support of the poor. The court held that, "the providing for the poor (including burial) is an administrative duty of the County Court, and we are to presume they properly discharged their duty; but if in any instance they fail to do so, the remedy is not by the interference of private persons voluntarily providing the relief, or doing the act." The matter of providing for the burial of the poor, in the opinion of the court, vested exclusively in the discretion of the County Court.

It is true that Judge Scott dissented from the majority of the court, and if it were a case of the first impression we might be inclined to follow his views. But where a court of last resort construes a statute, and that statute is afterwards re-enacted, or continued in force, without any change in its terms, it is presumed that the legislature adopted the construction given to it by the court. There have been two revisions of our statute laws since the opinion of the Supreme Court referred to was announced, and the section under review was continued and re-enacted in each revision, without any change in its language.

Saunders v. St. L., K. C. & N. R. R. Co.

It has been nineteen years since that opinion was delivered, and we are not at liberty to disturb the construction then given to this section, after it has thus been re-enacted and continued in force with this construction, as a part of the law itself. It is for the legislature, and not the courts, to change and enact laws.

Under this view, the judgment of the court is reversed; the other judges concur.

JONATHAN SAUNDERS, Respondent, vs. St. Louis, KANSAS CITY, & NORTHERN RAILROAD CO., Appellant.

1. *Railroads—Timbered lands, fencing of.*—The statute concerning railroad corporations (Wagn. Stat., 310, § 43) contemplates, that the company shall fence in the line of its road adjoining all inclosed lands whether timbered or otherwise. (Slattery vs. St. L., K. C. & N. R. R. Co., 55 Mo., 362.)

Appeal from Randolph Circuit Court.

Woodson & Reed, for Appellant.

T. B. Kimbrough, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action for double damages for killing a mare belonging to plaintiff, brought under 1 Wagn. Stat., § 43, p. 310. The mare was killed by the defendant's ears in a timbered inclosure by straying on the railroad track at a point where it was not fenced.

The only question raised and discussed is whether the railroad company was bound to fence its road, as required by section 43 above referred to, where it passes through or along timbered inclosures. This question has been passed upon and decided in the affirmative by this court in several cases. (Hudson vs. St. L., K. C. & N. R. R. Co., 53 Mo., 525; Slattery vs. St. L., Kas. City & N. R. R. Co., 55 Mo., 362; Seaton vs. Chicago, R. I. & Pac. R. R. Co., 55 Mo., 416.)

Let the judgment be affirmed. All the judges concur.

Patten v. Casey, et al.

TEVIS C. PATTEN, Defendant in Error, *vs.* LUCIUS CASEY, *et al.*, Plaintiffs in Error.

1. *Conveyances, voluntary—Made by persons in embarrassed circumstances—Fraudulent in law, when.*—In order to invalidate a voluntary conveyance, it is not necessary that there should be an actual intent to hinder and delay creditors. It is sufficient to show in such case, that the grantor was in embarrassed or doubtful circumstances, and was not possessed of ample means outside of the property conveyed for the satisfaction of his then existing debts. Such conveyance, under such state of facts, is fraudulent in law as to creditors, at the time of its execution.

Error to Jackson Circuit Court.

Sawyer & Christman, for Defendant in Error

Gage & Ladd and Stephen P. Twiss, for Plaintiffs in Error.

SHERWOOD, Judge, delivered the opinion of the court.

This was a proceeding in the nature of a bill in chancery, instituted by Tevis C. Patten in the Circuit Court of Jackson County against Lucius Casey and others, to set aside a conveyance made to Casey by Alexander Gilham, in March 1858, of certain lots in Kansas City for the benefit of the wife and children of said Gilham, and which conveyance contained also a provision, that in the event of the death of the wife or of the children or issue of the marriage, the conveyance should be void. The petition in substance sets forth that the firm of Gilham & McDaniel, (of which Alexander Gilham was a member,) was indebted to plaintiff prior to and at the time of the above mentioned conveyance; that Gilham was then largely indebted and had not sufficient property to pay his debts; that many of the same remained unpaid; that the said conveyance was without valuable consideration, in fraud of the rights of existing creditors, and particularly of plaintiffs; that Gilham died in 1859; that plaintiff's claim had been probated against both the individual estate of Gilham and against the partnership estate of Gilham & McDaniel, and each of those estates were insolvent, and that no part of plaintiff's demand had ever been satisfied; etc., etc.

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The defendants, in their answer, denied the chief allegations of the petition, except that which charged the renewal of the old note of February, 1858, by the note of February of the year following.

There is nothing in the evidence preserved in the bill of exceptions to indicate that the conveyance referred to was made by Gilham with any actual fraudulent intent to hinder, delay or defeat his creditors in the collection of their debts, nor is it necessary, in order to overthrow a voluntary conveyance, that such an intent should be established. It is sufficient in such case to show that the grantor was in embarrassed or doubtful circumstances, and was not possessed of ample means, outside of the particular property, for the satisfaction of his then existing debts. When this condition of affairs is proven to exist, the conveyance in question—although none but the purest motives may have prompted its execution—becomes fraudulent in law and is open to the attacks of, and can be successfully assailed by, all who were creditors at the time of the execution of the conveyance, and whose debts remained unliquidated, and incapable of collection in the ordinary course of proceedings. (Potter vs. McDonnell, 31 Mo., 62.)

When under the herein disclosed circumstances, a voluntary conveyance is called in question, however meritorious its consideration, the claims of affection must yield to those of justice. A man must be just before he is allowed to be generous. An examination of the testimony in this case has failed to convince me that the circumstances of Gilham were so free from embarrassment, and his available means so manifestly abundant, as to warrant him in conveying the above mentioned property in trust for his wife and children.

I am of the opinion, therefore, that the court below arrived at a correct conclusion, and that its judgment should be affirmed; all the judges concur.

Fordyce v. Hathorn.

J. M. FORDYCE, Plaintiff in Error, *vs.* I. N. HATHORN, Defendant in Error.

1. *Practice, civil—Defenses in abatement waived, when.*—Where matters in abatement and bar are contained in the same answer, the matters in abatement are waived by setting up the defenses in bar.
2. *Landlord and tenant act—Proceeding under—Petition may be amended, how.*—In a suit by attachment under the landlord and tenant act, plaintiff cannot, by amendment, change his cause of action so as to maintain the attachment against a plea in abatement. But if defendant appears to the action and files an answer in bar to the merits, the petition may be amended in the same manner and for like reasons as in other actions.
3. *Landlord and tenant—Rent in kind—Place of payment.*—Where rent is payable in kind and no place of payment is stipulated, a tender upon the premises is sufficient. And the tenant holds the property so set apart as bailee at the risk and expense of the landlord.

Error to Cole Circuit Court.

E. L. Edwards & Son, for Defendant in Error.

G. T. White, for Plaintiff in Error.

ADAMS, Judge, delivered the opinion of the court.

This was an action commenced under the landlord and tenant act, by attachment, for the recovery of rent payable in kind. The cause was tried on an amended petition.

The defendant, in the same answer, set up matter in abatement of the attachment and also defenses in bar of the action.

The court on motion of plaintiff struck out the matter in abatement. In this we think there was no error. Where matters in abatement and bar are contained in the same answer, the matter in abatement is waived by the defenses in bar. (Cannon *vs.* McManus, 17 Mo., 345; Rippstein *vs.* St. Louis Mut. Life Ins. Co. Mo., *ante*, p. 86.)

It was also contended by the counsel for the defendant that the plaintiff had no right to amend his petition as it was a suit by attachment under the landlord and tenant act. He would certainly have no right to entirely change the cause of action so as to maintain the attachment against a plea in abatement. But if the defendant appears to the action, and

files an answer in bar, I see no reason why the petition may not be amended in such actions in the same manner and for like reasons as in other actions.

The case was tried before a jury and resulted in a verdict and judgment for the defendant. The rent sued for consisted in part of the crop of corn which was to be grown on the land, and the material question was as to the place of delivery. The plaintiff contended that the place of delivery was at his barn on a hill some distance from the field, and the defendant contended, that there was no such place named, and that the contract only required him to gather the corn in the field. Each party gave evidence to prove his theory. The instructions presented the different views of the parties fairly to the jury.

On the part of the defendant the court instructed, that if there was no place named by the contract, for the delivery of the rent corn, the defendant might deliver it on the premises in a pen suitable for that purpose. The evidence showed that the defendant was hunting the plaintiff to ascertain where he would have the corn delivered, and the plaintiff claimed that the delivery was to be in his barn on the hill, and the defendant claimed that the delivery was to be made on the premises, and began to deliver on the premises when the attachment was served and possession of the crop was taken by the officer. So that the material inquiry on the trial was as to the place of delivery. The doctrine in regard to this question is thus laid down by Taylor in his treatise on *Landlord and Tenant*. "In regard to the place of payment, it is to be observed, that when rent in kind is payable by the terms of contract at such a place in a market town, as the lessor shall appoint, and no appointment has been made, it is the duty of the lessee to seek the lessor, ascertain the place of payment, and there deliver his rent. If the landlord cannot be found, a delivery anywhere within the market town would be sufficient. And whether payable in money, or kind, if no place of payment is specified, a tender of either upon the land is good, and prevents a forfeiture. Although the tenant is

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under no obligation to go and seek the landlord, provided the contract is silent as to the place of payment, a formal tender to him anywhere is sufficient." (Tayl. Landl. & Ten., [5th Ed.,] Par., 392, pp. 289, 290; Lusk vs. Druse, 4 Wend., 313; Walter vs. Dewey, 16 Johns. R., 222; Van Rensselaer vs. Jones, 5 Den., 453.) If the lessee discharges himself by a delivery on the premises of rent in kind, he holds the property thus set apart and delivered as bailee, at the risk and expense of the landlord. (Sheldon vs. Skinner, 4 Wend., 525; Slingerland vs. Morse, 8 John. R., 477.)

The instruction objected to by the plaintiff, seems to be in accordance with the doctrine as here laid down and as generally understood.

The judgment seems to be for the right party. Judgment affirmed; all the judges concur.

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J. W. JENKINS, Respondent, vs. E. D. HILL, et al., Appellants.

1. *Venue, change of—Time of filing application for.*—Where a defendant in an action fails to file an answer in the time required by the statute, and on a subsequent day of the term when the case is called for hearing, presents a petition for a change of the venue without filing or offering to file any answer, or giving any excuse for his failure so to do, or otherwise showing that he has any defense to the action, the petition for a change of the venue is properly overruled. (Wagn. Stat., 1355, §§ 2, 3.)

Appeal from Jasper County Court of Common Pleas.

E. Y. Mitchell, for Appellants.

I. The application for the change of venue was in strict compliance with statute, and the court had no discretionary power in the premises, but was legally bound to grant the prayer of appellants for the change of venue. (Freleigh vs. State, 8 Mo., 606; Wagn. Stat., p. 1355, Ch. 142. §§ 2, 3.)

II. The rule of the Circuit Court is an abortive effort by the court below to legislate, and is not sanctioned by reason or law. (See Wagn. Stat., *supra*; Calhoun vs. Crawford, 50 Mo., 458, 461.)

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III. The court should have changed the venue and ought to have sustained appellant's motion to set aside, etc. (Bailey vs. Kimbrough, 37 Mo., 182-4; State, *ex rel.*, Duncan vs. Price, 38 Mo., 382; Gale vs. Michie, 47 Mo., 326; §§ 1, 2, 3 Wagn. Stat., Ch. 142.)

Nathan Bray, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This action was founded on a promissory note alleged to have been executed by the defendants to the plaintiff for the payment of three hundred and thirty-three dollars. The petition was in the usual form, and the summons made returnable to the November term of the Greene Circuit Court, which was to commence on the first Monday in November, 1871. The defendants were duly served more than fifteen days before the first day of the term.

On the first day of the term the judge of the court not being able to be present to hold the court, he, in pursuance of the statute (Wagn. Stat., p. 421, § 23), notified the sheriff of the county to adjourn said court until the second Monday in November, 1871, which was accordingly done. On said second Monday of November, 1871, the court was convened in the usual way, the same being the 13th day of said month, when the court made the following order of record, to-wit:

"Ordered by the court, that the time of pleading be extended until the sixth day, except in all cases which may be called for trial before the sixth day." This case was set for hearing on the first day of the term, on the docket as made out by the clerk of the court.

The defendant, Williamson, made no appearance. The defendant, Hill, on the third day of the adjourned term appeared and filed his application and affidavit for a change of the venue of the cause, setting forth as cause for said change, "that the inhabitants of said county of Greene are so prejudiced against him, that he cannot have a fair and impartial trial of said cause in said county."

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This petition was verified by the affidavit of said Hill, in which he states that the facts stated in the petition are true, and that the inhabitants of Greene County were so prejudiced against him that he could not have a fair and impartial trial of said cause in said county.

On the fourth day of said adjourned term the cause came on to be heard, when the defendant presented his said petition for a change of venue to the court, and the plaintiff objected to the granting of said petition by the court for the reasons; "First—That the petition and affidavit were not filed on or before the day for which said cause was set for trial, as required by the rules of the court; Second—That the grounds of belief of the affiant are not set forth in the petition or affidavit as required by the rules of the court. The rules of court referred to, provide that an application for a change of venue must be made at least as early as the day on which the case is set for trial, and that the petition shall set forth the facts with grounds of the belief as to the facts on which the application is founded supported by the affidavit of the party.

No question was made as to the plaintiffs having proper notice of the petition or motion for a change of venue. The court overruled the defendant's motion for that purpose. The defendant, Hill, excepted to the ruling of the court and refused to answer or take any further action in the case in said court. The court rendered a judgment against the defendant for the amount of the note sued on with interest. This final judgment does not appear in the record, but the parties in this court agree by stipulation in writing that the judgment was rendered, and that it is to be considered as a part of the record.

The said defendant, in due time, filed his motion to set aside the judgment and grant him a new trial. This motion being overruled by the court, he again excepted and appealed to this court.

It is insisted in this court, by the defendant, that his application for a change of venue was made in conformity

to the statute, and that the rule of court requiring parties applying for a change of venue to state the grounds of their belief, as to the facts required to be stated in the petition, is in conflict with the statute and void.

It is further insisted, by the defendant, that his application was made in proper time; that the court had extended the time of answering in the case so that he was not bound to answer until the calling of the case, and that at the time his motion was filed for change of venue, he was in no default, and that it was therefore the duty of the court to have changed the venue in the cause, and having failed to do so, the judgment should be reversed.

It is not necessary that we should decide on the validity of the rules of the court referred to in this case in order to dispose of the case. By an examination of the order made by the court extending the time of pleading, it will be seen that that order could not affect this case. The order provides that the time of pleading was to be extended to the sixth day, except in cases which might be called for trial before the sixth day. In all cases triable before the sixth day, the time was not extended. They were excepted from the order of the court and, of course, must be proceeded with under the statute. It was the plain duty of the defendant, if he had any defense to the action, to have filed his answer to the petition on the second day of the term. This he failed to do; but on the third day of the term filed a motion or a petition to change the venne in the cause. He makes no excuse to the court for failing to answer, asks no leave to answer, expresses no intention to answer, nor avers that he has any meritorious defense, or any defense to the action. I cannot believe that the legislature, in providing that a defendant must file his application to change the venue in a cause before or at the time of filing his answer, ever intended that he could stand by and file no answer until the time for filing had expired and the plaintiff was entitled to a judgment by default, and then come in, and without offering to answer, or otherwise showing that he has any defense to the action, have the venue of the case changed, and thus de-

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lay a plaintiff, who is at the time entitled to a judgment by default. In this case it is not stated in the motion for a new trial or elsewhere, that the defendant has any defense to the action, or that he ever proposes to file any answer.

I think that the legislature, by requiring the motion for a change of venue to be filed on or before the filing of defendant's answer to the merits, intended that it should be filed promptly before or at the time the answer is required to be filed by the statute, and not after he has failed to answer, so that the plaintiff is entitled to a judgment by default. At least in such case, he would be required to show some excuse for not answering in time, and to show that he had some meritorious defense which he proposed to set up. Otherwise there would be nothing to try after the venue had been changed.

The judgment will be affirmed; the other judges concur.

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KANSAS CITY HOTEL CO., Defendant in Error, *vs.* R. H. HUNT.
Plaintiff in Error.

1. *Corporations—Capital stock, increase of—Meeting of stockholders—Certificate, defects in—Subsequent subscription.*—Where a meeting of stockholders, touching increase of capital stock, is held pursuant to the statute, (Wagn. Stat., 335-6, § 12,) but the certificate of the proceedings fails to state "the amount of capital stock paid in" and "the whole amount of the debt and liabilities of the company," such defects will not defeat a recovery for the amount of his subscription against a stockholder, where it appears, that his shares were subscribed subsequent to the date of the certificate, and the facts are sufficient to raise the presumption that defendant subscribed, with a knowledge of the defects and waived the same. But the mere subscription without any payment thereon, or any other act of recognition, will not bind the defendant.

Error to Jackson Circuit Court.

Wm. E. Sheffield, for Plaintiff in Error.

Lay & Belch and Brown & Case, for Defendant in Error.

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NAPTON, Judge, delivered the opinion of the court.

This action was to recover the amount of subscription made by the defendant to the increased capital stock of the Kansas City Hotel Company. The subscription was made subsequent to the formation of the company under the general corporation law, and after an increase of stock was assumed to have been made in accordance with the provisions of the 11th and 12th sections of the 7th article of the act concerning corporations. The original amount of stock was 40,000 dollars, and in pursuance of a resolution of the stockholders at a meeting held in accordance with the provisions of the statute, the stock was increased 80,000 dollars.

The only defense relied on, was that the chairman and secretary of the meeting of stockholders, at which the increase of stock was voted, did not, in their certificate purporting to be in conformity to the 12th section of the 7th article, certify the "amount of capital paid in" nor "the whole amount of the debt and liabilities of the company." In other respects this certificate is conceded to have been in conformity to the statute. The Circuit Court held this omission to be fatal to the case and so declared in an instruction, and thereupon, the plaintiff took a non-suit with leave, etc. And whether this omission in the certificate was a bar to a recovery, under the circumstances of this case, is the only question presented by the record.

That the Kansas City Hotel Co. was duly organized under the general law concerning incorporations, is not denied; that the directors of the company published the notice required by the 11th section of the 7th article of the act concerning Incorporations, and gave due notice to the stockholders of the time and place of meeting to decide on the question of increasing the stock, was proved, and that a meeting of the stockholders under such notice was held, and that at such meeting, two-thirds of the stockholders voted to increase the stock to 80,000 dollars, is also conceded; that the chairman and secretary of this meeting gave a certificate purporting to be in compliance with the 12th section of the arti-

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cle aforesaid is also conceded; and that this certificate was duly recorded, and that it complied in all respects with the statute, except in two particulars above mentioned, is also admitted or proved. This certificate failed to show the amount of paid up stock and the amount of debts and liabilities of the company.

The company was organized on the 14th day of April, 1868; the meeting of the stockholders to vote on a proposed increase of stock was held on the 9th of May, 1868, and the certificate of the chairman and secretary was filed on the 19th of May, 1868.

It does not appear when the defendant subscribed, but it seems the second call made on him was on May 4th, 1868, from which it may be inferred, that this subscription was shortly after the organization of the company and the increase of stock, though it is evident the dates are incorrect. It however appears from the record, that the organization of the company and the increase of stock and the subscription of defendant occurred in rapid succession, within a very short time, in the months of April, May and June, 1868.

The court instructed, that unless a certificate of the proceedings of the meeting of stockholders, held to increase the capital stock of plaintiff, showing a compliance with the law and the amount of capital stock actually paid in, the whole amount of debts and liabilities of the company, and the amount to which the capital stock should be increased, was made, duly signed and certified by the affidavit of the chairman and countersigned by the secretary; and such certificate was acknowledged by the chairman, and recorded in the recorder's office of the county, the capital stock of plaintiff was not increased, and the plaintiff cannot recover; and further, that there is no evidence that such certificate has ever been made out and recorded. The question is, whether the defendant who subscribed ten shares of stock, after these proceedings, may avail himself of the omissions in the certificate in order to avoid the payment of his subscription.

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The 12th section of the act is very explicit in requiring the certificate to state the amount of paid up stock, and the amount of debts and liabilities of the company, and that when the certificate is so recorded, the capital stock of the company shall be increased or diminished, etc.

It is well settled, that parties recognizing the existence of corporations, have no right to object to irregularities in their organization. If the State chooses to tolerate such irregularities, it is not for individuals to question these acts, certainly not for individuals who make contracts with them.

The defendant's subscription was a contract with the company, and recognized the existence of increased stock. In point of fact, the stock had been increased, but the certificate of the increase did not in all respects comply with the law.

The certificate was imperfect, but, as it was on the public records, it was open to the inspection of all who desired to subscribe. If there were defects in it which would have influenced the defendant in his subscription, he had the opportunity of informing himself as to the facts. He chose to subscribe to the stock, the increased stock *de facto*.

In the *Methodist Episcopal Church vs. Pickett*, (19 N. Y., 486,) it was observed by Judge Selden, that "the imperfection of the record cannot be taken advantage of by a private individual who has entered into engagements with the corporation. The rightfulness of its existence not being in issue, of course evidence of any irregularities or defects in its organization, short of such as would show a want of good faith on the part of those concerned in the proceedings, would be wholly irrelevant. If the law exists, and the record exhibits a *bona fide* attempt to organize under it, very slight evidence, if any, beyond this, is all that can be required." In this case the question is not as to the existence of the corporation, but as to its increase of stock, though it will be observed, that in point of time the facts may be regarded as contemporaneous.

There could not be a doubt that the defendant, if there had been proof of his participation in the proceedings of the cor-

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poration in any shape, would have been held liable on his subscription. But there is no such proof. A defect in a certificate, it is well settled, is not available to a stockholder who has, by his conduct, waived the defect. In this case, the organization of the company is speedily followed by an increase of stock. The defendant, who subscribed to the increased stock, seems to occupy no better position than the original stockholder; any exposition of the matter required by the statute, in regard to the liability of the company and the money paid up, would hardly have influenced his action in subscribing.

The cases in regard to this point have been examined, and they all agree, that where the subscription has been acquiesced in, either by the payment of part of the subscription, or by becoming a director, or by attending meetings of stockholders, or by any other act indicating an acquiescence in the validity of his subscription, his defense based on mere technical objections will be disregarded. But the present case is peculiar, in that it shows nothing but the bare act of subscribing; nor is the date of the subscription averred or proved. It appears, that the ten per cent. required by the articles of association to be paid on subscription, was never paid; that the defendant never took any part in the company's acts, except to subscribe. It is not shown but that the defendant subscribed before the certificate of the chairman and secretary of the stockholder's meeting was recorded. But we must presume it was made afterwards; since the plaintiff alleges so in his petition.

We are unable to see that the declaration of law made by the court was wrong, under the proofs in the case. There was no explanation given by the plaintiff, of the action of the original stockholders, or of subsequent subscribers. Whether any stock had been paid in, whether any debts had been contracted when the defendant subscribed, does not appear. There are many facts which would influence this court in regard to the propriety of the abstract proposition announced by the Circuit Court, but those facts are not before us upon the case as presented; we

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therefore see no grounds for reversal, although we do not concur in the proposition of the Circuit Court as an abstract proposition, applicable to all cases.

Judgment affirmed; the other judges concur.

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STATE OF MISSOURI, Respondent, vs. WILLIAM BAILEY, Appellant.

1. Practice, civil—Instructions.—Instructions which are not based upon facts in the case, and are calculated to mislead, although correct as abstract propositions of law, should be refused.

Appeal from Henry Circuit Court.

McBeth & LaDue, for Appellant.

H. Clay Ewing, Atty. Genl., and B. G. Boone, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted for murder in the first degree, in killing one Hopkins, and on his trial he was convicted of manslaughter in the second degree. To reverse that judgment he has appealed to this court.

The evidence shows that ill-feeling had, for some time, existed between the defendant and Hopkins, in consequence of Hopkins being the author and circulator of a cruel slander against defendant's mother.

On the evening when the homicide was committed, Hopkins was in a store in the town in which he lived, and in a short time thereafter, defendant came in. Hopkins was boisterous and flourished his pistol, and accused defendant of following him, ordered him to leave, and then declared that they might as well settle their difficulty at that time. Defendant denied that he was following him, but declined leaving, saying that he had as good right to stay there as Hopkins. A couple of men then took hold of defendant and besought

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him to leave, in order to avoid a conflict. He went out with them in front of the door, and Hopkins immediately followed. At that time defendant's mother, who had been informed of what was going on, came up and said to Hopkins, that if he wanted to shoot anybody to shoot her. He answered her with a disgusting blackguard expression, and the firing immediately commenced, several shots being fired on each side.

The witnesses do not attempt to fix, with any accuracy, the point as to who fired the first shot. Some say that they think the defendant fired first; others say that Hopkins was the first to fire, but all concur, that the firing on both sides was nearly simultaneous.

A great many objections are now urged against the proceedings below, but after examining them carefully I am of the opinion, that most of them are too technical to be available, and it will therefore be only necessary to consider some of the instructions excepted to. As abstract propositions of law, the instructions are correct, and the only question to be determined, is, whether they were warranted by the evidence.

The fifth instruction given for the State tells the jury, that if they find, from the evidence, that defendant, Bailey, and deceased, Hopkins, had a difficulty which resulted in the death of Hopkins, and that the defendant commenced the difficulty or brought it on by any willful and unlawful act of his, or that he voluntarily, and of his own free will and inclination, entered into the difficulty, then there is no self defense in the cause, and they should not acquit on that ground. In such a case it makes no difference how imminent the peril may have been in which the defendant was placed during the difficulty.

The first part of this instruction was calculated to mislead. The evidence, so far from supporting it, was directly against it. There was no evidence tending to show, that defendant commenced the difficulty, or brought it on by any willful or unlawful act of his. But on the contrary, it is clear, that while in the store, he tried to avoid the altercation with Hopkins. He allowed himself, without resistance, to be taken

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away, and was followed out of the door. Hence, this part of the instruction was wholly unauthorized, as there is nothing in the facts, as presented by the bill of exceptions, that can be tortured so as to show that the defendant either sought or commenced the difficulty in any manner.

The sixth instruction is as follows: "If you find, that defendant, William Bailey, willfully and deliberately killed said George W. Hopkins by shooting him with a pistol, there is no murder in the second degree in the case, but the homicide is murder in the first degree, or manslaughter, or justifiable homicide according to circumstances; that is, if Bailey shot and killed Hopkins in malice, it is murder in the first degree; if Bailey shot and killed Hopkins in a cruel and unusual manner in a heat of passion as above described, but without a design to kill, it is manslaughter in the second degree, and if he, Bailey, shot and killed said Hopkins, in a heat of passion, without a design to effect death, not in a cruel and unusual manner, the offense is manslaughter in the third degree."

There is no evidence whatever, even tending to prove that the shooting was done in a heat of passion and without a design to kill, so as to make it manslaughter in case of death. None of the characteristics or *indicia* of manslaughter in any degree, are anywhere developed in the case.

When the parties met in front of the store, they mutually commenced the firing. Which fired the first shot it is impossible to tell, as they both fired so nearly at the same time. It is evident then, that the grade of the offense could not be manslaughter. It was either murder or justifiable homicide. The instruction, therefore, was erroneous and should have been refused. Instructions numbered eight and nine, defining the punishment for manslaughter in the different degrees, were also wrong, because not applicable to the case.

It follows that the judgment should be reversed and the cause remanded; the other judges concur.

WEL MUSICK, Respondent, *vs.* A. & P. R. R. Co., Appellant.

1. *Practice, civil—Instructions.*—An instruction not based on evidence should be refused.
2. Under Wagn. Stat., § 43, p. 310, a railroad company is not responsible for stock killed by the cars, *etc.*, when such killing takes place at a point on their road where it is not fenced and when it does not pass through or along inclosed or cultivated fields, or uninclosed prairie lands, unless actual negligence be proven.

Appeal from Franklin Circuit Court.

J. N. Litton, for Appellant.—*J. White*, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This suit originated before a justice of the peace, and was brought to recover \$50.00 as the amount of damages alleged to have been sustained by plaintiff in consequence of the killing, by the engine and cars of defendant, of stock belonging to plaintiff. The action is based on 1 Wagn. Stat., § 43, p. 310, which requires railroad corporations to "erect and maintain good and substantial fences on the sides of the road where the same passes through, along or adjoining, inclosed or cultivated fields or uninclosed prairie lands," and until the erection of such fences, renders the railroad company liable in double damages for any injury done to horses, cattle and other animals. The jury found for the plaintiff, and the court on his motion doubled the damages and rendered judgment for \$100.

The defendant might have well demurred to the evidence, as there was not a particle of testimony offered by the plaintiff to bring this case within the provisions of the section before referred to, on which his action was founded. For although the jury might, perhaps, have legitimately inferred, that the stock was killed by the engine and cars of the defendant, yet, there was nothing adduced to show that such killing took place where the road of defendant passed "through, along or adjoining inclosed or cultivated fields," nor that such fields were within some three-fourths of a mile in any given direction of the above mentioned locality.

For these reasons the instruction which was granted on the part of the plaintiff as it had no evidence on which to rest, should have been refused.

Judgment reversed, all the judges concur.

Schmidt v. Smith.

FRANK SCHMIDT, Plaintiff in Error, *vs.* J. L. SMITH, Defendant in Error.

1. *Deed of trust—Sale under—Proceeds—Payment of taxes.*—A trustee holding the naked legal title to land, cannot, on a sale of the property, use part of the purchase money to satisfy taxes, or prior incumbrances, unless he is empowered thereto in the instrument creating the trust. If all such cases the purchaser takes the land subject to the incumbrances. *A fortiori* taxes cannot be so satisfied where they constitute a simple debt against the owner, and not a lien on the property.

Error to Cole Circuit Court.

E. L. Edwards & Son, for Plaintiff in Error.

I. The deed of trust expressly states, that out of proceeds of sale the trustee should pay debts and costs, and the remainder, if any, should be paid to the plaintiff, "after paying all amounts expended as aforesaid, for taxes and assessments and other purposes." Now there is no evidence, nor is it contended by the defendant, that they ever paid any taxes or assessments, and we claim that unless the taxes were paid by the beneficiaries in said deed of trust, before the sale by the trustee under the deed of trust, then said taxes were no lien under the deed, and the trustee acted without authority when he paid them. (Scott *vs.* Shy, 53 Mo., 478.)

Ewing & Smith, for Defendant in Error.

I. The trustee, as the legal owner of the trust estate, was bound to pay the taxes assessed upon the premises, and in the condition of the trust property previous to and at the time of the sale there were no means in the possession or under the control of the trustee, subject to the payment of the taxes due and claimed for him by the collector of the city of Jefferson, other than those derived from the sale of the trust property, out of which said taxes were paid by the trustee. (Hepburne *vs.* Hepburne, 2 Bradf., 74; Bull *vs.* McEwen, 1 Baldw. Ct. Ct., 154; 1 Ves. Jr., 337; Hill Tr., 608, 673.)

II. The case of Scott *vs.* Shy, (53 Mo., 478) is not in point here, for the reason that the deed of trust in this case specially provides for payment of taxes.

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WAGNER, Judge, delivered the opinion of the court.

The facts in this case are briefly these: The plaintiff was indebted on two several promissory notes in the amount of six thousand dollars, and to secure their payment he executed a deed of trust to defendant on certain real estate in Jefferson City. Default having been made in the payment of the notes, defendant sold the property for seven thousand dollars, and after satisfying the debt and the expenses of the sale, six hundred dollars remained in the hands of the defendant. This amount he paid to the collector of Jefferson City in satisfaction of taxes assessed against the property.

The plaintiff made a demand for the money, claiming it as his, and upon defendant's refusal to pay he brought this action.

On the trial, it was agreed between the parties that the plaintiff was solvent and amply able to pay his debts, and that there was no law making the taxes a lien upon the property.

The court found for the defendant.

It is insisted that the defendant was fully warranted in using the money to pay the taxes after the sale was made, by virtue of a stipulation contained in the deed. The deed of trust contains this provision: "And whereas said Schmidt has agreed with the said party of the third part to cause all taxes and assessments, general and special, and also all United States taxes to be paid whenever imposed upon said property and within the time required by law, and in case there should be any taxes and assessments and United States taxes, or either of them, now in arrears, or in case there should be any default in the punctual payment of the same at any time thereafter, said party of the third part or their assigns, at their option may pay the same or redeem said property, and all amounts so expended shall become a debt due additional to the indebtedness aforesaid, and secured in like manner by this deed of trust."

The meaning of this clause in the deed is in no wise ambiguous or equivocal. It is an agreement on the part of the

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grantor, that he will pay up the taxes and assessments legally chargeable against the property, and in the event that he fails to do so, then the beneficiaries in the deed may pay the same for their own protection, and the property shall stand as a security for this additional sum. But this is an agreement with the beneficiaries or *cestui que trust* exclusively, and if they did not avail themselves of its privileges, by acting under it, neither the trustee nor any one else could do it in their stead.

A trustee holding the naked legal title, cannot, on a sale of the property, use part of the purchase money to satisfy taxes or prior incumbrances, unless he is empowered thereto in the instrument creating the trust. In all such cases the purchaser takes the land subject to the incumbrances. (Scott vs. Shy, 53 Mo., 478.)

Had the property sold for only three thousand dollars—half the amount the trust deed was given to secure—it is obvious that it would have been the duty of the trustee to have paid this full sum over to the beneficiaries, and that he could not have applied any of it to the payment of taxes. That the sale realized more than enough to discharge the whole debt, cannot alter the case or affect the principle. When the amount secured was paid off, the residue belonged to the grantor in the deed.

And more especially would this be the case here—where the taxes constituted a simple debt against the owner, and there was no lien against the property. No man can pay another person's debt without a request to do so, and then charge him therefor.

We have examined the authorities referred to by defendant, and they do not in any manner sustain his case. Bull vs. McEwen (1 Baldw. Ct. Ct., 154) was where land was conveyed on an undefined trust. It was unproductive, and the trustees held it for many years, paid the taxes on it, and managed it as they did their own property. The court held, that as under the law, the taxes were a lien upon the property, the trustees were entitled to be paid for the amount so expended, it being evidently for the benefit of the *cestui que trust*.

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The case of Hepburn vs. Hepburn, (2 Bradf., 74) was where the whole estate, real and personal, was given for life to S. and G., with remainder in fee to the issue of G., and in case he died without issue, then over; and the executors were authorized to take charge and rent the real estate, invest the personal estate, and pay the whole income to the life tenants. The court held that all ordinary taxes, assessments, interest on incumbrances, and charges for repairs should be kept down and paid out of the income.

This is a well recognized and familiar doctrine, but it has no application to the case now at bar.

I am unable to discover any principle upon which the judgment below can stand, and it must therefore be reversed, and the cause remanded. The other judges concur.

—o—

I. J. JONES Defendant in Error, *vs.* **ELIJAH JONES**, Plaintiff in Error.

1. *Practice, civil—Instructions—Commenting on testimony.*—An instruction, commenting upon particular portions of testimony, to the exclusion of others, although correct *pro tanto*, is calculated to mislead the jury, and should be refused.

Error to Osage Circuit Court.

Lay & Belch, for Defendant in Error.

Ewing & Smith, for Plaintiff in Error.

NAPTON, Judge, delivered the opinion of the court.

This suit was brought in 1869, by a son against his father, to recover an alleged indebtedness of the latter to the former, growing out of a series of transactions between them, commencing in 1859, and continuing to 1863.

The petition, in substance, alleges that the plaintiff owed the defendant about \$3000, and gave his note to defendant for that sum with interest—and then proceeded to aver payments

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at various times; first, by a note from James N. Jones, a brother of plaintiff, made payable to defendant in 1860, for \$985, which note was procured—as alleged by the plaintiff—and accepted by the defendant, as a payment on his, the plaintiff's note; second, by a transfer to defendant of a claim against said James N. Jones' estate, for \$200; third, by the transfer of certain promissory notes of one Wakefield, amounting to \$375, payable to defendant, and agreed to be credited on said note of plaintiff; fourth, by the value of a carding machine, alleged in the petition to have been converted to defendant's use, and which is put down at \$1000; and fifth, by collecting claims or notes of plaintiff, to the amount of \$4000, principally on one Johnson.

And the plaintiff claims, as the result of this account, an indebtedness of defendant, to him of \$3,500.

The defendant in his answer, insists that the plaintiff owed him in 1860 about \$4000; insists that he received the note of James N. Jones as collateral, and avers that he never collected a cent on said note—ignores the indebtedness of said James N. Jones' estate to plaintiff in the sum of \$200, and denies that he received such transfer of said asserted claim as part payment to him—denies that he received the notes of Wakefield as payment, and says they never were paid—admits that the carding machine was transferred to him, but denies the value asserted in the petition. The answer denies the collection of \$4000 for plaintiff.

The testimony in the case is reported in a bill of exceptions, which it is difficult to decipher; but as the main points in it have a bearing on the instructions given, and a suit of this sort is somewhat of a novelty, I have endeavored to gather the material facts appearing.

The plaintiff and defendant, father and son, are the principal witnesses.

The plaintiff, the son, states that in 1860 he owed his father about \$3000; that he paid it all off; that in 1863 he sold Wm. Johnson a tract of land; that in that year his brother, Jas. A. Jones, who lived in Texas county, owed him

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\$985 ; that he further agreed to take this note and credit him with the amount; that his father also agreed to take Wakefield's notes for \$375, and gave him credit for that sum ; that his brother, J. A. Jones, died in 1861, owing him about \$200; that his father administered on the estate, and that his father and Wm. Johnson and himself, went to Texas county to look into this matter, and his father thought the estate would pay nothing, and therefore, the credit of \$985 could hardly be allowed. However, his father ultimately agreed to allow this \$985 and the \$200 claim ; but in 1862, hearing that he reached a different conclusion, the plaintiff went to his house and claimed a credit of \$985 and \$200 and \$375 on Wakefield, which he refused to allow. The plaintiff then, as he says, sold his farm, and leased some property to Johnson for \$4000, and he offered his father Johnson's note for the \$4000 to pay up. His father said that would overpay him, but he would take it. He accordingly handed over Johnson's notes and lifted his notes.

The defendant, the father, stated that in 1854 he loaned the plaintiff and another son of his \$900 ; they were in partnership at Stonery Point ; that they got, between 1854 and 1859, 100 bushels of corn at 50 cents per bushel, a mare worth \$60, pork, oxen and 1200 lbs bacon; that in 1857 they got \$1500 in gold ; that they owed him \$3,500 or \$3,600 when he took plaintiff's notes. The firm was dissolved in about a year. He took plaintiff's notes about 1858 for \$3,500, bearing ten per cent. interest. In 1857 he received a note of James A. Jones to him, for \$987, which his son, the plaintiff, desired him to take, and he did so. He received the Wakefield notes in 1857. He also got four notes on Johnson, for \$1000 each, to be paid in pine lumber. The James A. Jones note was never paid ; he never heard of the account against his estate for \$200. He received the Wakefield notes as payment. In 1863 his son prepared a settlement. After final settlement, this witness states, he (plaintiff) borrowed \$300, and he kept this till it amounted to \$460.50, and then it was settled. He afterwards borrowed \$150 of witness, and his wife gave her note. He never claimed that plaintiff owed him anything.

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This witness, who is the father of plaintiff, then states, "I stated that the Johnson notes overpaid the principal of Irwin's indebtedness to me, but not the interest. I do not owe Irwin anything that I know of."

These are the main facts of the case, derived from the statement of the father and son. They show very clearly that there was no ground for this action.

There was then evidence introduced to contradict the testimony of the defendant, and to sustain it. It was clear that the plaintiff admitted a settlement with his father, and that he stated on various occasions, that he owed his father nothing; that they were even; that he was "out of father's clutches."

The fact of his borrowing money of his father after this, and giving his note and his wife's note, is almost conclusive evidence that he had no claim against him.

But the facts are only important to this court in determining the propriety of the instructions to the jury. Juries are the judges of facts, and we cannot disturb their verdict, however abhorrent it may be to our views.

The petition in this case was informal, but no demurrer was filed; there was in it a recital of various items of indebtedness, but in substance it was a claim for the amount of money asserted to be due from defendant on a running account between the parties. A single clause in the petition sounds like a claim for a trespass or trover and conversion; but taking the whole petition together, we may infer that the trespass was waived.

There are not five counts in the petition, nor can we understand the plaintiff as claiming but one judgment. The motion in arrest for defects in the petition may therefore be properly overruled.

The question arises on the instructions.

The 3rd instruction given for the plaintiff is as follows: "If the jury believe from the evidence that the plaintiff was the owner of the carding machine mentioned in the petition, and the defendant took the same and converted it to his own

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use, they would find for the plaintiff the value thereof." And 4th, "although the jury may believe from the evidence, that the plaintiff did duly deliver to the defendant the Johnson notes, and did receive his own without demanding a credit for the Jas. A. Jones' note and account, the Wakefield's note and the carding machine, and did state to persons that he had given these claims to the defendant to 'get out of his clutches' and did say that they 'were even,' yet if the jury further believe from the evidence, that the plaintiff never had any credit for the same, and never received value therefor, they will disregard such declarations, and find according to the weight of evidence, unless the jury shall find that a settlement was made between the parties, and the notes, accounts and carding machine were included in the said settlement."

The 5th instruction for plaintiff was, "If the jury believe from the evidence, that any witness swore willfully falsely as to any matter material to the issue on this cause, they will disregard such false statements, and may disregard the whole of such witness' testimony.

The objection to the 4th instruction is, that although abstractly correct, and to a certain extent applicable to the facts in evidence, and to the main issue regarding the alleged settlement, yet it calls the attention of the jury to specific portions of the testimony, and directs the jury to disregard these declarations of plaintiff, if they believe the weight of evidence is against this truth.

It will be observed that there was testimony; that after the alleged settlement between the father and son in 1863, the plaintiff borrowed considerable sums of money from the defendant, and gave his notes for the same. No reference is made in the instruction to this proof, which certainly, without explanation, was very strong proof that the plaintiff did not consider his father indebted to him in the sum of \$3000, or any other sum, when he borrowed \$350 of him, and gave his note for it. This instruction is calculated to mislead the jury by allowing them to disregard all testimony showing plaintiffs declarations, if, upon the whole evidence, they

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should conclude that his admissions were made in ignorance of his rights. At the same time there was other evidence in the case tending to the same result, and to this evidence no reference is made in the instruction. This instruction was a comment upon a particular part of the evidence; it was a correct comment, but it was well calculated to mislead the jury. The entire evidence was for their consideration, and the admissions of plaintiff were a part of this, and entitled to due weight. So, also, was the evidence in regard to the loans of money made after 1863.

The fifth instruction is one frequently given, and, we believe, has been sustained by this court. It is undoubtedly law, but it is frequently calculated to mislead juries. It would be much better to tell a jury that they need not believe any witness any farther than they believe he speaks the truth. And it would be still better to say that the credibility of all witnesses is for them to determine, and that the whole evidence in the case is for their consideration.

The verdict in this case seems to be unfounded, and not supported by the evidence, but this court has no power to interfere with the verdict of juries, after they have been sanctioned by the judge presiding on the trial.

We shall reverse the judgment in this case, however, because of the 4th instruction, and remand the case for a new trial. Judgment reversed, and cause remanded.

Wm. Lucas, et al., Respondents, *vs.* F. M. Cole, et al., Appellants.

1. *Partnership, what essential thereto.*—To constitute a partnership, there must be an agreement between the parties that they will, from a certain day or time, share the profits and be responsible for the losses, and carry on the business for their mutual benefit; and there must be an entering upon or conducting, or doing business under such agreement, or some business preparatory thereto, to make them or either of them liable to third parties as partners.

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*Appeal from St. Clair Circuit Court.**Burdett & Smith, for Appellants.**R. F. Buller, for Respondents. .*

NAPTON, Judge, delivered the opinion of the court.

This suit was on a note of which the following is a copy:

"St. Louis, Mo., Oct. 27th, 1860.

Six months after date, we, the subscribers, Francis M. Cole and Johnson Dawson of Indian Point, County of St. Clair, State of Missouri, promise to pay to Lucas, Thompson & Co., a firm composed of William Lucas, Charles L. Thompson & John Hicks, Jr., two hundred and eighty-three and seventy-eight hundred dollars for value received, negotiable and payable without defalcation or discount, with interest at the rate of ten per cent. per annum.

(Signed)

F. M. Cole,

John Dawson."

The defendant, Dawson, denied the execution of the note and denied the partnership with Cole, at the time of its execution. It appears that Cole had been doing business at Indian Point as a merchant, for some years previous to Oct., 1860, and during that month and before the execution of the note sued on, a partnership between him and Dawson was proposed and discussed and agreed on; that Cole went down to St. Louis and bought the goods for which the note was given, and signed Dawson's name; that upon his return Dawson kept the books of the concern in the name of Cole & Dawson, and supposed himself to be a partner, until in December, when a difference of opinion arose between Cole & Dawson, and as Dawson supposed, the partnership never was consummated. And this was the only question in the case, viz: whether a partnership actually existed between Cole & Dawson at the time of the execution of the note.

The testimony is not preserved on the record, except as to its general tendency, and the only point here, arises on the instructions.

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The court declared the law as follows: "If the defendants, Cole & Dawson, on or about the middle of Oct., 1860, and before the date of the note sued on, entered into an agreement to sell goods in co-partnership at IndianPoint, and after said agreement was made, the defendant, Cole, represented to plaintiffs that they were in co-partnership and bought goods and gave a note in the joint names of both defendants, the court will find the issue for the plaintiffs, even though the court may believe from the evidence, that no invoice was taken, and that the said co-partnership was dissolved soon after the 27th Oct. 1860. To constitute a partnership there must be an agreement between the parties, both consenting thereto, that they will, from a certain day or time, share the profits and be responsible for debts and losses and carry on the business for their mutual benefit; and there must be an entering upon or conducting or doing business under such agreement, or some business preparatory thereto, to make them or either of them liable to third parties as partners."

The question submitted to the court was chiefly one of fact, and the evidence not being preserved, the applicability of the instructions given and refused, to the facts proved, is not a point upon which this court has the means of determining. We see no objections to the declarations of law made on the trial.

The fact that Dawson had agreed on a partnership with Cole, and that Cole bought the goods from plaintiffs after the agreement, and signed Dawson's name to the note for the purchase money, that Dawson kept the books subsequently in the name of Cole & Dawson, go very far to establish the authority of Cole to sign Dawson's name as partner. That Cole represented to plaintiffs that Dawson was his partner is apparent from the note itself. Dawson's name could only have been signed by Cole on such assumption.

The main objection to the instruction given by the court, which was asked by the defendant, but modified by the court, was that the Court considered business "preparatory to the business of the partnership" as binding on the partnership. In this

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case the preparatory business evidently was the purchase of the goods in St. Louis, and the purchase was manifestly authorized by Dawson, who claimed the co-partnership long after the return of Cole, and kept the books in the name of Cole & Dawson.

The judgment must be affirmed; the other judges concur.

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CHAS. E. WILSON, *et al.*, Respondents, *vs.* MATILDA MAXWELL, *et al.*, Appellants.

1. *Practice, civil—Fraud in fact—Question for the jury.*—Upon mere questions of fraud in fact, the Supreme Court will be reluctant to interfere with the verdict of a jury.

Appeal from Jackson Circuit Court.

J. H. Stover and A. Comingo, for Appellants.

J. K. Sheley, for Respondents.

NAPTON, judge, delivered the opinion of the court.

This is a bill or proceeding to have two deeds declared fraudulent, so that the plaintiff, who bought under execution, may have a clear title to the lands sold.

The plaintiffs were creditors to a small amount,—\$120.00 or thereabouts,—of Wm. A. Maxwell, who was one of the heirs of Jno. Maxwell, deceased, who died in possession of a tract of land in Jackson county, of over 500 acres. The plaintiffs obtained a judgment before a justice, for their demand, and afterwards filed the transcript in the clerk's office, and got an execution, and sold the defendant's interest in the said lands, and became the purchasers.

Previous to this sale, Mrs. Maxwell, the widow of John Maxwell, had bought from her son William his interest in his

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father's estate, and had conveyed a portion of it to another son of hers, who is also made defendant. This suit is to have these deeds declared fraudulent and void, on the ground that no consideration passed to the mother, and that the whole transaction was contrived to defeat creditors, and especially the plaintiffs.

The Circuit Judge submitted the question of fraud to a jury, and the jury found against the defendants, and the court adopted their finding and made a decree accordingly, setting aside the deeds, and confirming the plaintiff's title under the sheriff's sale. And the evidence in the case is all preserved in the record, and we are asked to arrive at a different conclusion on it, which is said to be totally at variance with the facts.

We should reluctantly venture to differ with a jury on a question of this sort, especially after receiving the sanction of the Circuit Court. No points of law are made, and upon mere questions of fraud in fact, a jury is better qualified to determine than this court. The Circuit court was not bound by the verdict, but thought proper to adopt it, and upon an examination of the evidence, we hardly think it is a case to justify the interference of this court.

Judgment affirmed; the other judges concur.

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SOUTH PACIFIC R. R. CO., Appellant, vs. LACLEDE COUNTY, Respondent.

1. *Railroads—Atl. & Pac. R. R.—Taxation—Act of Dec. 25, 1852, a contract.*—The twelfth section of the act of Dec. 25th, 1852, and its acceptance by the Pacific Railroad, were a contract between the State and that company binding the state, and for two years after its completion exempted that road from taxation, no dividend being declared in the meantime; and the same principle governs as to taxation of what is denominated as the South West Branch Railroad. (See decision in Pacific R. R. Co. v. Maguire, Wall, U. S. Sup. Ct. R.)

South Pacific R. R. Co. v. Laclede County.

Appeal from Laclede Circuit Court.

Baker & Litton, for Appellant.

N. H. Dale, P. P. Bland and G. W. Bradfield, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

In this case, at the last term of this court, a conclusion was reached by a majority of the court, and I prepared a very full statement of the facts, and an opinion upon all the points they were supposed to involve, but it having been suggested upon consultation, that a case involving the same question was then pending before the Supreme Court of the United States, and would be decided at an early day, it was thought best to defer any judgment until this decision was ascertained.

For the question involved being in regard to the validity of an exemption from taxation, for two years, in the Pacific Railroad charter, its decision by this court, unless favorable to the exemption, would have been subject to reversal by the Supreme Court of the United States. The case of Pacific Railroad Co. vs. Maguire, now reported in the newspapers, has determined the point and settled the question, so far as the two years exemption is concerned; and the railroad company and the present owners do not claim any exemption since the expiration of the two years after its completion. Therefore it is useless to encumber our reports with a detailed investigation of the points already settled by the highest judicial tribunal having cognizance of the case, and we simply refer to this case as determining the present and three other cases, now pending in this court.

With the concurrence of all the judges, the judgment below must be reversed.

Barry County v. A. & P. R. R. Co.—Lawrence County v. A. & P. R. R. Co.

BARRY COUNTY, Respondent, *vs.* ATLANTIC & PACIFIC R. R. Co., Appellant.

1. Judgment reversed. See South Pacific R. R. Co. v. Laclede Co., *ante* p. 147.

Appeal from Barry Circuit Court.

Litton & Harding, for Appellant.

N. H. Dale & Jos. S. Cravens, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This case depends on the same question decided in the Laclede County case, and the same order will be entered.

Judgment reversed; the other judges concur.

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LAWRENCE COUNTY, Respondent, *vs.* THE ATLANTIC & PACIFIC R. R. Co., Appellant.

1. Judgment reversed. See South Pac. R. R. v. Laclede Co., *ante* p. 147.

Appeal from Lawrence Circuit Court.

Baker & Litton, for Appellant.

Henry Brumback, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This case involves the same question determined in the Laclede County case, and the same order must be entered for a reversal.

Judgment reversed; the other judges concur.

Acock v. Stuart.

LUCY A. ACOCK, Defendant in Error, *vs.* RICHARD STUART, Plaintiff in Error.

1. *Sheriff's deed—Recitals as to judgment in favor of administrator.*—The record entry of a judgment recited its rendition in favor of A. and B. The execution recited judgment of same date for same sum and against same defendant, but in behalf of A. & B., as administrators, and alleged that their letters had been revoked, and that execution had been ordered in the name of the public administrator, and the substitution was shown by the court records. *Held*, that the record taken together, sufficiently showed that the judgment was in favor of A. & B., in their administrative capacity, and that a sheriff's deed reciting such judgment, was not *quoad hoc* defective.

Wright & Johnson, for Plaintiff in Error, cited in argument, Wagn. Stat., 601; Crittenden *vs.* Leitensdorfer, 35 Mo., 239.

John S. Phelps, for Defendant in Error.

ADAMS, Judge, delivered the opinion of the court.

This was an action of ejectment for several hundred acres of land situated in Polk county.

Both parties claim title under Esau Stuart, the plaintiff, by virtue of two sheriff's deeds, and the defendant by a subsequent deed from Esau Stuart, who was the defendant in the execution sales, and sheriff's deeds under which the plaintiff claims.

The only material question raised and discussed here, is whether the sheriff's deeds recited properly the judgment and executions, and whether such executions corresponded with the judgment that had been rendered by the Polk Circuit Court against Esau Stuart.

The two sheriff's deeds recited substantially that the executions were issued on a judgment in favor of James Atkinson and Benjamin F. Acock, as administrators of Robert E. Acock deceased, rendered on the 21st day of October, 1863, for \$2,577.30 debt, and \$500 damages against Esau Stuart.

After the plaintiff had closed her case by reading the sheriff's deed and proof of damages, the defendant read the entry of the judgment, from the record, which was rendered on the

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21st of October, 1863, and it was agreed that this was the judgment referred to in the sheriff's deeds, and was the only judgment against Esau Stuart. The judgment as entered, is for \$2,577.30 debt and \$500 damages, and is in the following form :

"Atkinson and Acock
vs.
Esau Stuart. } Civil action.

Now at this day come the plaintiffs, and it appearing to the satisfaction of the court that the writ of summons has been duly served, etc." The entry then proceeds to render up a regular judgment against the defendant, Esau Stuart. The defendant then read the executions under which the sheriff's sales and deeds were made, which appear to have issued on a judgment for the same amount and of the same date as this above, but recite the judgment as being in favor of the plaintiffs as administrators of Robert E. Acock, deceased.

One of the executions further recites that the letters of administration of Acock and Atkinson had been revoked, and that execution had been ordered to issue on this judgment in the name of Millikan, as public administrator of Polk county, having charge of the estate of Robert E. Acock, deceased.

The plaintiff then read an entry from the records, which recited that a judgment had been rendered on the 21st day of October 1863, in favor of Benjamin F. Acock and James Atkinson, as administrators of the estate of Robert E. Acock deceased, against Esau Stuart, and on the petition of Alexander Millikan, public administrator of Polk county, the court being satisfied of the facts, ordered execution on this judgment to be issued in favor of the public administrator, inasmuch as the letters of administration of the plaintiffs had been revoked. This execution was issued, and was one of the executions under which one of the sheriff's sales and deeds were made.

The simple question in the case is, whether the whole record as it stands before us, shows that the judgment which was entered on the Circuit Court records in the name of

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Acock and Atkinson, was really in their names as administrators of Robert E. Acock, deceased.

The petition in that case is not before us. That ought to determine whether the judgment was in their individual or representative capacities. The Circuit Court determined, in ordering the execution to issue in the name of the public administrator, that this judgment was in their representative capacities, as administrators of Robert E. Acock, deceased. And as it was agreed that there was no other judgment, we must presume that the whole record, including the petition, taken together, demonstrated the representative character of this judgment.

Why neither party introduced the original petition on the trial, we are at a loss to imagine. That would have shown beyond dispute the real character of this judgment. But we think it sufficiently appears from the record, as it stands before us, that the judgment was not in their individual but in their representative capacities as administrators.

The Circuit Court took this view of the case, and rendered judgment in favor of the plaintiff. We see no good reason to decide otherwise. The judgment will therefore be affirmed. The other judges concur.

W. S. SPARR, Respondent, vs. St. Louis, Kansas City & Northern R. R. Co., Appellant

1. *Railroads—Timbered lands—Inclosure of road along.*—Under the statute touching Railroad Companies, (Wagn. Stat., 310, § 43) they are bound to fence the line of their roads adjoining inclosed lands, although timbered.
2. *Railroads—Action for damages in name of owner—Constr. Stat.*—Suit against a railroad company, to recover double damages for injuries to stock, need not be brought in the name of the State, under § 42 of the Railroad Act, (Wagn. Stat., 310) but may be instituted in the name of the owner, under § 43, (p. 310-11).

Sparr v. St. L. K. C. & N. R. R. Co.

Appeal from Randolph Circuit Court.

Woodson & Reed, for Appellant.

T. B. Kimbrough, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action for double damages, brought under the statute, (§ 43, 1 Wagn. Stat., 310) for killing a cow belonging to plaintiff.

The cow was killed by the defendant's cars, at a point where the road runs along or adjoining a timbered inclosure. Judgment was rendered in favor of the plaintiff for double damages, and the defendant has appealed to this court.

Two questions were raised ; first, was the defendant bound to fence its track where it passes through or adjoining timbered inclosures ; and, second, can the plaintiff sue in his own name, or must the suit be brought in the name of the State ?

Both of these questions have been settled by this court, and we are satisfied that they have been properly considered and determined.

The defendant was bound to fence its road where it passes through or adjoining timbered inclosures, and the suit was properly brought in the name of the plaintiff. (See *Hudson vs. St. L. K. C. & N. R. R. Co.*, 53 Mo., 525; *Slattery vs. St. L. K. C. & N. R. R.*, 55 Mo., 362; *Fickle vs. St. L. K. C. & N. R. R. Co.*, 54 Mo., 220; *Seaton vs. Chicago, R. I. & P. R. R. Co.*, 55 Mo., 416.)

Let the judgment be affirmed ; all the judges concur.

Acock v. Acock.

BENJ. F. ACOCK, Plaintiff in Error, vs. LUCY A. ACOCK, Defendant in Error.

1. *Judgment—Fraud and irregularity.*—A party seeking to set aside a judgment for fraud or irregularity must take the burden of proof, of establishing his charges.
2. *Practice, civil—Motion for new trial—Points not embraced in, disregarded in Supreme Court.*—Points not embodied in a motion for a new trial will be disregarded in the Supreme Court.

Error to Polk Circuit Court.

Wright & Abbe and Johnson, for Plaintiff in Error.

McAfee & Phelps, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff instituted this proceeding in the circuit court for the purpose of setting aside a judgment obtained against him by the defendant on constructive notice.

The petition charges, that the defendant had no valid claim against the plaintiff, and that the judgment was procured wrongfully and fraudulently. On motion a part of the petition was stricken out, and the defendant then filed her answer denying all the allegations therein.

The only evidence introduced by the plaintiff was the record of the suit in which the judgment was sought to be set aside; by which it appeared, that the defendant, in November, 1864, commenced her suit by attachment in the Polk circuit court upon a contract in writing made in 1861, and alleged to be in the possession or under the control of plaintiff or one Robinson, and not in the possession of defendant; and stated that said contract was signed by plaintiff and Robinson, stating that they had bought the distributive share or interest of the defendant, in the slaves belonging to the estate of her husband, R. E. Acock, deceased; that her share of said slaves was delivered to plaintiff and Robinson; and they promised and agreed, in consideration thereof, to pay defendant for her interest the appraised value of the slaves less ten per cent.—one-half in promissory notes and the residue in real estate.

The appraised value of the slaves was \$17,100, and the defendant was entitled to one-sixth part of the same. It was also agreed that defendant might retain one slave valued at

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\$800; and it was then alleged that defendant and Robinson failed and refused to comply with their agreement.

With the petition were filed an affidavit and bond for an attachment in due form, and a writ was issued which was levied on certain lands belonging to plaintiff. Publication was regularly made and proved. The writ was returnable to the March term, 1865, at which term no answer being filed, an interlocutory judgment was taken. At an adjourned term of the next regular court, on the 11th day of December, 1865, a final and special judgment was rendered in favor of defendant for \$1,845 debt and \$513.51 damages, and in conformity therewith, a special execution was issued, and the land sold and purchased by one Eno, to whom a deed was made. On the 28th day of November, 1868, this petition was filed by the plaintiff to set aside the judgment.

The petition in this case does not proceed under the provisions of the statute in reference to setting aside judgments in attachment proceedings, rendered on publication only, for that requires that the proceeding should be instituted within two years—which was not done here. (1 Wagn. Stat., § 60, p. 193, *et seq.*) It is then, simply a petition to avoid the judgment for fraud or irregularity.

The principal ground insisted upon now, is, that the petition in the attachment suit was founded on a written contract for defendant's share of the slaves, which was valued at \$2,850, and that the affidavit stated the demand to be justly due, after allowing credits and off-sets, amounting to \$1,845 and interest, and that the judgment was for the latter sum and damages. Now the interest of the slaves, was valued at \$2,850, as stated, but as the defendant kept one at \$800, and then deducted ten per cent., it would just leave \$1,845, the amount sworn to in the affidavit.

The damages, which it is claimed were not asked for in the petition and not spoken of in the order of publication, were nothing more than the interest on the demand which was directly asked for. This is the usual manner of writing up judgments.

Brown v. Mayor, Councilmen and Citizens of Glasgow.

The petition sets forth a claim for a demand and interest. When the judgment is entered, the demand is styled the plaintiff's debt, and the interest is termed his damages. The evidence on which the judgment was rendered was satisfactory to the court and we will not review it. We fail wholly to see anything in the shape of an irregularity authorizing us to disturb the judgment.

The plaintiff introduced no evidence whatever, to sustain his allegation of fraud; but the defendant did what was not necessary, she again introduced her evidence, and proved up her case clearly and satisfactorily. The court therefore committed no error in deciding in her favor.

The action of the court in striking out a part of the plaintiff's petition we will not review. It was not embodied as one of the errors, or points insisted upon in the motion for a new trial, and therefore must be disregarded. (Curtis vs. Curtis, 54 Mo., 351, and cases cited.)

Moreover, it does not appear, that in consequence of that ruling, the plaintiff was deprived of any evidence he possessed. Under the allegations of fraud which remained, he might have introduced any witness he had on the subject, but he seems to have had none. He relied wholly on the record in the former suit and that was palpably insufficient to sustain him.

Judgment affirmed; the other judges concur.

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COLMAN B. BROWN, Defendant in Error, *vs.* THE MAYOR, COUNCILMEN AND CITIZENS OF GLASGOW, Plaintiffs in Error.

1. *Damages—Municipalities—Failure to repair streets—Measure of liability.*—City authorities are bound to keep in repair only such streets and parts of streets as are necessary for the convenience and use of the traveling public, and where at the point of accident the street was abundantly wide and well repaired to enable persons, with the exercise of ordinary care, to avoid the injury, the city will not be responsible merely from the existence of a defect in the untraveled portion of the street.

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Error to Howard Circuit Court.

Mayor & Pitts, for Defendant in Error.

Turner & Cuples and W. H. Lewis, for Plaintiffs in Error,
cited Bassett vs. St. Joseph, 53 Mo., 290.

SHERWOOD, Judge, delivered the opinion of the court.

On the trial of this cause, the evidence tended to show that as plaintiff's wagon and team were being driven into the city of Glasgow, the team becoming frightened by persons riding up behind it and making a noise, commenced running away, whereupon the driver jumped out, leaving four women passengers in the wagon; that the horses then ran down the street towards the Missouri river, and after running about five squares, ran into a hole or gully on the side of the street, causing thereby the death of one of the horses and serious injury to the other, as well as considerable damage to the wagon and harness; that the hole or gully was not in the traveled portion of the street; that the part of the street where the hole was, could not be traveled, but that opposite the place where the accident occurred, the street was fifty-five feet wide, and the traveled portion thereof was thirty feet in width, and was in such condition that wagons and teams could, without any difficulty, safely travel along free from any danger in consequence of the existence of the hole or gully referred to, if ordinary care were used in driving them. Evidence was also adduced as to the amount of the damage sustained.

Upon this alleged state of facts, the plaintiff sought a recovery from the corporate authorities of the city, and the jury, under the instructions of the court, rendered a verdict in favor of the plaintiff.

The instructions given on his behalf, were to the following effect: that the defendants were required to keep the streets of the city in a proper state of repair, so that such streets should be reasonably safe for travel; and any neglect in this particular, resulting in injury, would render them liable to

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the plaintiff to the extent of such injury, unless it were occasioned by the negligence or carelessness of plaintiff or his agent.

And the defendants were refused instructions, which told the jury in substance, that plaintiff, before he could recover, must prove that the alleged injury was occasioned alone by the alleged defect in the street, without any fault, neglect, and mismanagement on the part of himself or his driver; and if that street was safe and in good order, of a sufficient width to have been traveled safely with ordinary care and prudence; and the damage was occasioned by the plaintiff's team getting from under the control of the driver and running away outside of the usually traveled portion of the street, to the spot where the accident took place, the defendants were not liable.

In a case recently decided by this court, that of Bassett vs. The City of St. Joseph, (53 Mo., 290) the subject of the liability of cities in respect to keeping their streets in repair, is fully discussed, and many of the authorities reviewed and commented on, and it is there held that the city is not "required or bound to keep all of her streets in good repair under all circumstances. She is only bound to keep such streets and such parts of streets in repair as are necessary for the convenience and use of the traveling public. * * * * * There are streets or parts of streets in many cities, which are not at present necessary for the convenience of the public, which will be brought into use by the growth of the city, or there may be streets that have more width than is necessary for the present use or the requirements of travel. All that is required in such cases is, that the city see that as the streets are required for use, they shall be placed in a reasonably safe condition for the convenience of travel."

In Titus vs. Inhabitants of Northbridge, (97 Mass., 258) where there was a defect in the highway, which the town was bound to keep in repair, and a horse, by reason of fright or otherwise, becoming actually uncontrollable, ran until he came to the above mentioned defect, and an injury was thereby occasioned, it was held that the town was not liable for the

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injury, unless it further appeared that such injury would have resulted irrespective of the question whether the driver had lost control of the horse or not. And this case, although in conflict with the decisions in some other States, seems to me to enunciate the better doctrine. For it would certainly be a most unreasonable demand to require the corporate authorities of a city not only to provide safe and commodious streets for all ordinary purposes of travel, but to provide thoroughfares of such ample dimensions and such matchless grade, that accidents, even from runaway teams, would be absolute impossibilities.

In the case at bar the evidence conclusively shows, that the thoroughfare on which the accident occurred was of sufficient width for all the travel usual thereon, and that the exercise of only an ordinary amount of care would have prevented any injury, notwithstanding the defect which existed in the untraveled portion of the street; and that the injury which occurred to plaintiff, was not the result of the defect in the street *per se*, but of the driver losing or rather abandoning control of the horses.

For these reasons the instructions given on behalf of the plaintiff, although abstractly correct, should have been refused as having no applicability to the facts adduced in evidence.

On the contrary, the instructions asked by defendants should have been given; as not only did they state the law correctly, as laid down in the authorities I have cited, but they exactly fitted the case established by the testimony.

The judgment must be reversed and the cause remanded; all the judges concur.

Johnson v. Gage.

W. P. JOHNSON, Respondent, *vs.* AARON GAGE, Appellant.

1. *Attachment—Order of publication—Variance—What not material—When order may be published.*—The fact that the published order in an attachment suit purported to have been made by the order of the clerk instead of that of the court as stated in the original order, will not vitiate a sale of land under it in a collateral proceeding. And a publication ordered by the clerk in vacation after the lapse of two terms from the date of process, and without any new affidavit would be good. (Kane *vs.* McCown, 55 Mo., 181.)
2. *Attachment—Order of publication—Filing papers—Presumption as to.*—The issuance of an order of publication raises the presumption that the petition and other papers in the case had been filed theretofore, without any indorsement thereon of the date of filing.
3. *Attachment—Jurisdiction—Publication.*—Where in an attachment suit the required affidavit and bond have been filed, and an attachment regularly issued, and land seized and levied on by virtue of the attachment, the court thereby acquires jurisdiction of the case as to the property attached, and a judgment rendered in such cause against the property attached will not be void, although no sufficient publication has been made. (Freeman *vs.* Thompson, 53 Mo., 183; Holland *vs.* Adair, 55 Mo., 40.)

Appeal from Polk Circuit Court.

Baker & Ellis, for Appellant.

W. P. Johnson, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This was an action of ejectment brought in the Polk Circuit Court, to recover the possession of lands in Polk county, in the petition described. The petition was in the usual form. The answer was a denial of the facts stated in the petition. Both parties claim to derive their title from T. D. Hall and John B. Wells.

The trial was had before the court, no jury being required by the parties.

The plaintiff read in evidence, without objection, a deed executed by Thomas D. Hall and John B. Wells, dated June 10th, 1870, purporting to convey the land in controversy to the plaintiff, and it is not disputed that the deed is sufficient for the purpose, provided said Hall and Wells were the owners of the land at the time the deed was executed. The plaintiff also offered evidence as to the value of the rents and profits, etc.

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The defendant on his part offered in evidence; first, a deed from one John Caldwell, as sheriff of Polk county, dated September 28th, 1865, purporting to convey the interest of Thomas D. Hall in the land in controversy, to one James Baker. The deed recited that on the 22d day of May 1863, a writ of attachment was issued by the clerk of the Circuit Court of Polk county, in favor of Daniel Molder and against Thomas D. Hall, which was delivered to the sheriff of Polk County, and by virtue of which said sheriff, on the 25th day of May, 1863, seized and levied upon the land in controversy. Said cause was proceeded in to judgment and execution against said lands, and a sale thereof to said Baker on the 28th day of September, 1865. The deed concludes by conveying the land to said Baker, in proper form. There is no objection made as to the sufficiency of the form of said deed.

The defendant then read in evidence another deed from the sheriff of Polk county, to said James Baker, purporting to convey the lands in controversy to said Baker. This last deed recited that on the 21st day of January, 1864, a writ of attachment was issued by the clerk of the Polk Co. Circuit Court in favor of James P. Beck, executor of the estate of Preston Beck and against Thomas D. Hall and John B. Wells, which was delivered to said sheriff, and by him on the 5th day of March, 1864, levied on all of the right, title and interest of said defendants in the land in controversy. The suit in which the attachment was issued, was prosecuted to a judgment, and the land ordered to be sold to pay the judgment. A special execution was issued on said judgment and the land sold in due form of law, and conveyed to said Baker.

The defendant then read in evidence a deed from said Baker, purporting to convey the land to defendant. These deeds were all unobjectionable in form, and it is not insisted that they were insufficient to convey the land in controversy to the defendant, provided the judgments upon which the executions were issued, were valid judgments and sufficient to uphold the executions issued thereon, so as to confer title

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by the sales and sheriffs' deeds thereunder. This was all of the evidence offered or given by the defendant.

The plaintiff, to show the invalidity of the judgments under which the land was sold to Baker, offered and read in evidence the entire record and proceedings in the cases of Molder against Thomas D. Hall, and the case of Beck against Thomas D. Hall, and John B. Wells; after which the evidence was closed.

At the request of the plaintiff the court then, among other declarations of law made, declared it to be as follows:

1st. "The judgment read in evidence in favor of James Beck, executor of the estate of Preston Beck, deceased, against Thomas D. Hall, was rendered without notice actual or constructive, and is void, and the sale made under said judgment and said execution by the sheriff, conveyed no title to James Baker."

2nd. "The judgment read in evidence in favor of Daniel Molder and against T. D. Hall and John Wells, having been rendered without notice, is void, and the sale made and deed executed under the same by the sheriff conveyed no title to James Baker."

The defendant objected to these declarations of law, but his objections were overruled, and he at the time excepted.

Judgment was then rendered in favor of the plaintiff; after which the defendant filed a motion for a new trial, which being overruled by the court, he excepted and appealed to this court.

It will be seen from the declaration of law above set forth, that the whole case was made to turn, so far as the defendant's title is concerned, on the want of notice to the defendants in the judgments and executions under which the land was sold to Baker. For it is not questioned that the deed of Baker to the defendant conveyed to defendant whatever title he had, or that it was prior in time to the deed from Hall and Wells to plaintiff.

It is not seriously questioned in this court, but that a proper affidavit was filed in each of the cases referred to, to author-

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ize an attachment to issue, or that the attachments were regularly issued and levied on the land in question. But it is insisted that no sufficient publication or service was made on or against the defendants in either of the cases, to authorize the court to render a judgment therein, and that, therefore, the judgments and all of the subsequent proceedings thereunder are wholly void, and that the sheriffs' deeds to Baker therefor vested no title whatever in him to the land in controversy.

In the case of Molder vs. Hall, at the next term of the Polk Circuit Court, after the commencement of the suit and the issuance of the attachment, which was holden in October 1863, it appearing to the court that no service had been had on the defendant, the court made an order requiring publication to be made in proper form. It seems that no publication was made under this order.

At the next term of court, holden in the month of April, 1864, no publication having been made under the former order of the court, a second order of publication was made by the court, notifying the defendant to appear and plead at the next term of the court, to be commenced on the 4th Monday in September, 1864. This order of publication was in due form and in compliance with the statute.

It appears from the record, that after the adjournment of the court, a copy of this last order was published in proper time, except that there was a variance between the publication made and the one ordered by the court, in the fact, that the order of publication actually published and proved, purported in the commencement to have been made by the clerk of the court in place of by the court. In all other particulars it conformed to the order made by the court.

It is objected by the plaintiff, that inasmuch as there had been two terms of the court after the service of the attachment, the clerk had no jurisdiction to make an order of publication, and that the publication of said order was a mere nullity and the judgment rendered in the case therefore void.

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I think that the publication made in this case was sufficient. The publication was substantially as ordered by the court; the fact that it purported, as published, to have been made by the order of the clerk, would at most, only be an irregularity which could not be taken advantage of in a collateral proceeding. And it has been held by this court, that a publication ordered by the clerk in vacation, after two terms of the court and no new affidavit filed, would be good. This exact question was discussed and decided by this court at the last January term, in the case of *Kane vs. McCown*, (55 Mo., 181) to which reference is made for the law on that subject.

It is claimed by the plaintiff that it appears from the record of the proceedings had in the case of *Beck, Ex'r, vs. Hall and Wells*, that the court had no jurisdiction to render the special judgment against the property attached, and that the judgment in that case is also void, and could not afford any foundation for an execution or sheriff's deed thereon. The first objection made to the proceedings in that case is, that it does not appear from the transcript of the case that the petition and other papers in the case were filed with the clerk before the issuance of the attachment, and that the clerk had not indorsed his approval of the attachment bond on the bond. These objections are extremely technical. It may be true that the record does not show the date of the filing of the petition, but it is not to be presumed that the clerk would or could issue an attachment in a case in which the amount claimed by the petition and affidavits are recited when no such papers were filed before him. And then these papers all appear in the transcript in their regular order, and there is no reason to presume that they were not filed with the clerk, although they may not appear to have been marked as filed on the papers by him and the fact that his approval is not indorsed on the attachment bond, would only amount to an irregularity which would not render the proceedings wholly void.

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It is next insisted by the plaintiff that the judgment is void because there was no sufficient publication made of the pendency of the suit before the rendition of the judgment. It is shown by the record that what purported to be an order of publication made by the court, had been duly published and proved, there being no objection to either the form or proof of the order of publication; but there is nothing in the record to show that the court in fact ever made any such order of publication as that which was published, and which purports to have been made by the court.

It is hardly necessary to discuss in this case the effect of such an omission in the record of this order. The effect of a number of late decisions of this court is, that where in an attachment suit, the required affidavit and bond have been filed, and an attachment regularly issued, and land seized and levied on by virtue of the attachment, the court thereby acquires jurisdiction of the case as to the property attached, and that a judgment rendered in such cause against the property attached will not be void, although no sufficient publication is made; that the omission to prove publication is only an irregularity in the proceedings in a case of which the court already has jurisdiction, so far as the attached property is concerned, and that although a judgment rendered in such case might be set aside for irregularity in a direct proceeding for that purpose, yet the judgment would not be held absolutely void in a collateral proceeding.

This question has been so fully discussed in recent cases decided in this court, that it is deemed unnecessary to do more in this case than to refer to those cases and the authorities therein cited. (Freeman vs. Thompson, 53 Mo., 183; Kane vs. McCown, 55 Mo., 181; Holland vs. Adair, 55 Mo., 40.)

The case of Bray vs. McClurg, (55 Mo., 128) only holds that there must be, in such cases, such an affidavit as is required by the statute, in order to authorize the issue of the attachment and give the court jurisdiction of the case or over the property attached, and is not in conflict with the view taken in the other cases.

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It follows that the declarations of law given by the court as hereinbefore set forth, were improper.

The judgment is therefore reversed, and the cause remanded. Judge Adams concurs in the result; the other judges concur.

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HYRAM J. CHARLES, Plaintiff in Error, vs. MARY T. McCUNE, Defendant in Error.

1. *Actions—Trover of stock sent South during the war.*—In suit for the value of certain stock, where it appeared that plaintiff had sent the same from Missouri into Texas after the President's proclamation of non-intercourse of August 16th, 1861, and that defendant had there converted it to his own use; *held*, that these facts would not bar plaintiff's right of recovery. The plaintiff's act in sending the stock through the lines authorized its appropriation by the general government but not by a private citizen.

Error from Greene Circuit Court.

Bray & Hardin, for Plaintiff in Error.

I. No doubt if plaintiff sent his mules into an insurrectionary district from the State of Missouri, the government of the United States would have had the right and authority whilst they were in transit, to have seized and confiscated them under the act of July 13th, 1861. But this right is given alone to the government for revenue purposes, and not to individuals in their private capacity and for their own private gain. This is not a penal statute but a revenue statute, and must be liberally construed so as to accomplish its object.

McAfee & Phelps, for Defendant in Error.

The transaction between the plaintiff and the deceased was unlawful and no suit can be sustained. (The Reform, 3 Wall., 632; The Sea Lion, 5 Wall., 647; The Ouchita, 6 Wall., 521.) In Carson vs. Norton, (46 Mo., 467,) the suit was on a note given in the State of Arkansas in Nov., 1861. The defendant plead the illegality of the consideration, and proved

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the note was given in consideration of slaves taken from this State to Arkansas during the war, and it was held that plaintiff could not recover.

WAGNER, Judge, delivered the opinion of the court.

From the record it appears, that in 1863, the plaintiff and one McCune, defendant's intestate, both had stock in Texas in charge of a Mr. Messick, and that the stock had previously been taken there from this State. Plaintiff had three mules, and McCune obtained possession of them from Messick and converted them to his own use.

On the trial the plaintiff asked the court to instruct the jury that if they believed from the evidence, that McCune obtained the possession of plaintiff's mules by representing to Messick that he had purchased them of plaintiff, or by any other means, then they should find the issue for the plaintiff for the value of the mules.

This instruction the court refused to give, but, in behalf of the defendant, declared the law to be, that on and after the 16th day of August, 1861, and up to and including the year 1865, the plaintiff was, by law, prohibited from taking or sending his mules into Texas from this State, and if the jury believed that plaintiff did, in the year 1861, and after the 16th day of August, send or take, or direct, or consent that said mules should be taken from this State into the State of Texas, and that said mules were so taken or sent, then they should find the issue for the defendant, notwithstanding they might believe from the evidence, that after said mules were so taken or sent into Texas, McCune bought the mules from plaintiff or took and converted them to his own use.

After this instruction was given, plaintiff took a non-suit with leave to move to set the same aside, and after the refusal of the court to set aside the non-suit he sued out his writ of error.

In support of the judgment below it is now insisted, that after the passage of the non intercourse act by Congress and the President's proclamation, it was illegal for the plaintiff to

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remove his property into one of the insurrectionary States, and that no recovery can be had against any person for taking the same.

The fifth section of the act of July 13th, 1861, (12 U. S. Stat. at Large, 257.) authorized the President under the circumstances mentioned, to declare any State or part of a State, to be "in a state of insurrection against the United States," and it enacts that thereupon, "all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue, and all goods and chattels, wares and merchandise, coming from said State or section into the other parts of the United States, and all proceeding to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States."

In accordance with this enactment, on the 16th day of August, 1861, the President issued his proclamation interdicting all intercourse between the respective States or sections in hostility to the United States, with certain specified exceptions. The language of the act is clear and there is no room for doubt as to its meaning or effect. Commercial intercourse between the inhabitants of territory in insurrection, and those of territory not in insurrection was entirely prohibited, except under the license of the President, and according to certain regulations.

In the case of the Ouachita Cotton, (6 Wall., 521,) it was held, that the statute just referred to and the subsequent President's proclamation, rendered void all purchases of cotton from the rebel Confederacy by citizens or corporations of New Orleans, after the 6th of May, 1862. From this latter time dates the restoration of the national authority over New Orleans, and that part of Louisiana; and hence its citizens thenceforth, come within the disabilities of the acts. The law cuts off commercial intercourse, and was aimed at the resources of the enemy.

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In the present case the removal of the property was unquestionably illegal and rendered it liable to confiscation by the government. But both of the parties were citizens of the same jurisdiction, and there was no trading or intercourse with the enemy.

Because plaintiff's property was illegally in another State or section, it does not thence follow that another person had the right to appropriate it without having any legal or moral claim upon it. The government might have confiscated it for the public use, but I cannot see what right McCune had to confiscate it for his private benefit.

Wherefore it follows that the judgment should be reversed and the cause remanded; the other judges concur.

**Jos. C. Parry, Plaintiff in Error, vs. G. H. Walser, Adm'r
of Anderson S. Jones, Defendant in Error.**

1. *Evidence—Contents of lost record—Nature of action to prove.*—The general rule is, that if a record is lost or destroyed, its contents may be proved like those of any other instrument. And the party may proceed by his common law action without resorting to the statutory remedy.

Error to Barton Circuit Court.

C. W. Brown & Bray, for Plaintiff in Error.

G. H. Walser, for Defendant in Error.

VORIES, Judge, delivered the opinion of the court.

This action was brought in the Barton Circuit Court by the plaintiff against Anderson S. Jones and James Rutherford, who were at the time living, but who, after the commencement of the suit both died, after which, their administrators were made parties defendant.

The action was brought to recover the amount of a judgment charged to have been rendered by one Benjamin L. Hayward, a justice of the peace in and for Lamar township

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in Barton County in the State of Missouri, in favor of Joseph W. Petty, and against said Jones and Rutherford, on the 26th day of January, 1861, and afterwards assigned by said Petty to the plaintiff. It was alleged in the petition that the docket entry of the judgment and all of the papers connected therewith had been lost or destroyed.

The defendants, by their answer, denied all of the allegations in the petition, except the allegations that the docket entry of the judgment and the papers in the case had been lost or destroyed.

When the case came on for hearing the parties waived a jury, and trial was commenced before the court. The plaintiff after introducing evidence tending to prove the rendition of the judgment by the justice, and the loss or destruction of the docket entry of the judgment, and of the papers connected therewith, offered to prove, by parol evidence, the recovery and rendition of the judgment and the terms and contents thereof. To this evidence the defendants objected, for the reason that no proof had been made that the docket of B. L. Hayward was either lost or destroyed.

The court sustained the objection and excluded all evidence offered in the cause in relation to said judgment, for the reason, that it had not been shown to the satisfaction of the court that the docket of the justice had been lost or destroyed.

The plaintiff then took a non-suit with leave to move to set the same aside, which motion was afterwards filed and overruled by the court and final judgment rendered against the plaintiff. The plaintiff, at the time, excepted to the several rulings of the court in excluding the evidence offered, and in overruling his motion to set aside the non-suit, and in rendering the final judgment in the cause, and has brought the case to this court by writ of error.

The only question raised by the record in this case, necessary to be considered by this court, is, as to the propriety of the action of the Common Pleas Court in excluding the evidence offered by the plaintiff, to prove the contents or terms of the judgment rendered by the justice.

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The preliminary evidence introduced by the plaintiff to show the existence of the judgment, and its loss or destruction, was to the following effect: that on the 26th day of January, 1861, Benjamin L. Hayward was an acting justice of the peace in Lamar township in Barton County, State of Missouri; that on said day, Joseph Petty recovered in the court of said justice, a judgment against Anderson S. Jones and James Rutherford, which judgment was recovered on a promissory note, and was for the sum of one hundred and twenty-four dollars and thirty-seven cents; that about July, 1861, said justice of the peace left the State of Missouri and removed to, and settled in, the State of Kansas, where he afterwards died; that J. H. Remsburgh was elected, and acted as justice of the peace in said Lamar township as the successor of said Hayward; that said Remsburgh kept the books and papers pertaining to his office at his house; that his house was burned while he was absent from home in the year 1862; that the court house in Barton County, together with nearly all of the papers therein, was destroyed by fire in the year 1862; that the clerk of the County and Circuit Court, who was elected and had charge of the offices and papers pertaining thereto, in the year 1863 had made diligent search through the offices in his charge and could not find either the docket or papers of the said Hayward as justice of the peace, and that no such papers had been seen, in either the office of the clerk of the County Court or of the Circuit Court, since said clerk took charge of said offices, and no papers could be found there up to the time of bringing this suit.

Plaintiff then introduced as a witness one A. S. Harrington who stated, that he was a justice of the peace in Lamar township in Barton County, Missouri, in the year 1866; that he was the successor to J. H. Remsburgh, and that Remsburgh was the successor to Benj. L. Hayward; that neither the docket or any papers of said Hayward, as justice of the peace or otherwise, had ever come into his hands.

The plaintiff, after the introduction of this evidence, introduced one Nathan Bray, by whom he offered to prove the

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rendition and contents and terms of the judgment rendered in favor of said Parry, and against said Jones and Rutherford as before stated, which was rejected by the court as herein-before stated.

We think that the court improperly excluded the parol evidence to establish the existence and contents of the lost or destroyed record of the judgment. The general rule is, that if a record is lost, its contents may be proved like any other document, and the evidence given in this case, preliminary to the proof of the contents of the record, was sufficient to prove its destruction. In fact, the evidence seems to be almost conclusive on that subject. (Foulk vs. Colburn, 48 Mo., 225; 1 Greenl. Ev., § 84, p. 509, and cases there cited; Newcomb vs. Drummond, 4 Leigh, 57.)

It is, however, contended, by the defendant, that the statute of this State having furnished a remedy to the plaintiff, by which the record could be supplied, all other remedy is thereby taken away, and that the plaintiff was bound to follow the remedy furnished by the statute, and could pursue no other. (Wagn. Stat., p. 1137, §§ 14, 15.)

We do not agree to this view of the case. The destruction of the record did not destroy the force of the judgment, and the plaintiff might proceed to collect his judgment as at common law, without resorting to the mode furnished by the Statute. (Strain vs. Murphy, 49 Mo., 337.)

The other judges concurring, the judgment is reversed and the cause remanded.

CHARLOTTE GRADY, Appellant, *vs.* MARTIN A. McCORKLE, *et al.*, Respondents.

1. *Dower—Alienation of property by husband—Effect of.*—The alienation of real estate by the husband, whether voluntary as by deed or will, or involuntary, as by proceedings against him or otherwise, will confer no title on the alienee, as against the wife in respect to her dower.

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2. *Dower—Suit for specific performance estops claim for, when.*—In a suit for specific performance of a contract to convey land, brought against the widow and heirs of the owner, where the dower of the widow is not in any manner determined or litigated, or drawn in question by the proceedings, a decree for plaintiff will not estop the widow from afterward recovering her dower.

Appeal from Howard Circuit Court.

Thos. Shackleford, for Appellant.

I. The court will not estop a widow in her claim for dower by proceedings at law, unless it is manifest that the question in relation to her rights was properly adjudicated. (52 Mo., p. 98.)

Lay & Belch, for Respondents.

I. The matter of the widow's dower estate was distinctly in issue, and was actually passed on in the former suit, and the question is *res judicata*. (Freem. Judgm., § 246, *et seq.*)

II. One object of the proceeding was to have the value of the land determined so that it might be charged against Leonard Grady, his widow and heirs, as an advancement. The determination of the value of the land for this purpose necessarily required the court to take into consideration the dower estate of Charlotte Grady.

WAGNER, Judge, delivered the opinion of the court.

This was a suit commenced in the Circuit Court of Howard county, against the defendants, the widow and heirs of Leonard Grady, deceased, for the assignment of dower in certain real estate. From the record it appears, that in the year 1859, William Grady, the plaintiff's husband, was seized of the land in controversy, and agreed with his son, Leonard Grady, that if he would go on the land and improve it, he would convey the same to him by deed, by way of advancement, and charge him with its value at the time he took possession.

Under this agreement Leonard took possession of the land and made improvements on the same, and continued to reside on and cultivate it up to the time of his death.

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William Grady died without having conveyed the land according to the agreement, and without having fixed any price thereon, to be charged as an advancement.

In the year 1865, after the death of William and Leonard—the father and son—the widow and heirs at law of Leonard, who are the defendants in the present case, filed their petition in the Circuit Court against the plaintiff and the heirs of William, setting out the facts as above stated, and praying the court to decree that the land should be held by them as the widow and heirs of Leonard, as if the same had been conveyed to him by William in his life time, and to fix a valuation thereon, at which they should be charged for the same.

In this proceeding plaintiff was duly served with process, but made no answer. The court made a decree in accordance with the prayer of the petition, declaring that the land "described be, and the same is hereby vested in the plaintiffs, to be held by them as if the same had been conveyed by said William Grady in his life time, to the said Leonard Grady, and that the title of defendants, as the widow and heirs of William Grady be divested."

The court below held that this decree barred the plaintiff, the widow of William Grady, from having any dower in the premises, and this is the only question in the case.

The statute provides that "every widow shall be endowed of the third part of all the lands whereof her husband, or any other person to his use, was seized, of an estate of inheritance, at any time during the marriage, to which she shall not have relinquished her right of dower, in the manner prescribed by law, to hold and enjoy during her natural life." (1 Wagn. Stat., 538, § 1.)

The right of dower attaches whenever there is a seizin by the husband during the marriage, and unless it is relinquished by the wife in the manner prescribed by law, it becomes absolute at the husband's death. After the right of dower has once attached, it is not in the power of the husband alone to defeat it by any act in the nature of an alienation or charge. It is a right in law, fixed from the moment the facts of marriage

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and seizin concur, and becomes a title paramount to that of any person claiming under the husband by subsequent act. (Co. Litt., 32a.)

The alienation of the husband, therefore, whether voluntary, as by deed or will, or involuntary, by proceedings against him or otherwise, will confer no title on the donee, as against the wife in respect of her dower.

It is a necessary consequence of this rule, that all charges or derivative interest created by the husband, subsequent to the attachment of the wife's right, are voidable as to that part of the land which is recovered in dower. As the husband cannot defeat his wife's dower by any alienation of the land by himself alone, so neither can he bind her by any modification of the nature of the seizin, nor by any merger or extinguishment produced by his own act without her concurrence. (Scribn. Dower, 577.)

In conformity with these principles, it has been held that if a woman, after she becomes a widow, is made a party to a suit to foreclose a mortgage executed by the husband alone, and no allegation be made in the petition in reference to her claim for dower, the decree will not be considered as affecting her dower estate. (Lewis vs. Smith, 5 Seld., 502; Thompson vs. Reeve, 12 Mo., 157; Crenshaw vs. Creek, 52 Mo., 98; Freem. Judg., § 303.)

Neither the petition nor the decree in the case of Leonard Grady's widow and heirs vs. William Grady's widow and heirs, made any mention of the subject of dower, nor was it at all litigated or drawn in question. The whole object, extent and scope of that proceeding was to have the agreement and undertaking of William Grady specifically performed. The rights against the widow and heirs were precisely the same as they would have been against William Grady, had he been alive and made a party to the suit. But a suit against him would not have affected his wife's right to dower, without any concurring act on her part. The decree divested his title out of the widow and heirs, and vested it in the widow and heirs of his son. Nothing more was attempted and nothing more was done.

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The question of the plaintiff's right of dower was neither raised nor decided, and was not made a subject of adjudication in the suit for specific performance. The plaintiff did not answer, and although she was perhaps properly made a party, my conclusion is, that she is not barred from claiming her dower interest in the land—she having done nothing to relinquish the same.

Wherefore the judgment must be reversed and the cause remanded; the other judges concur.

—o—

W. H. LENOX, Adm'r of DAVID LENOX, Appellant, vs. E. A. SEAY, Adm'r of M.W. TRASK, Respondent.

1. Judgment affirmed.

Appeal from Phelps Circuit Court.

Bland & Bland, for Appellant.

Seay & Williams, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in equity to set aside a judgment of allowance made in favor of the defendant as administrator of M. W. Trask, deceased, against the estate of David Lenox, deceased, in the Probate Court of Phelps County, and to recover back from the defendant the amounts—say some two thousand dollars—that had been paid to the defendant on said judgment.

The facts of the case are about as follows: One Abraham Eaton was largely indebted to the estate of M. W. Trask, deceased, and in the settlement with the defendant, Seay, administrator of Trask, deceased, in payment of part of his indebtedness, assigned and transferred to Seay, the note in controversy which had been executed by the plaintiff's intestate and Hamilton Lenox and David Wilson to M. W. Trask

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dated 27th Aug., 1856, payable on or before the 1st day of February 1857, for \$2,800 to bear interest at eight per cent. per annum from the first day of June, 1856.

This note had a credit indorsed of \$2,000 paid 4th March, 1857, by a certificate of deposit on Simonds & Lucas for that amount, bearing interest at six per cent. from the 5th February, 1857, to date of certificate. The note having this credit on it, appears to have been assigned to Abraham Eaton by M. W. Trask on the 27th of April, 1860, and Eaton transferred it back to the defendant as administrator of Trask, deceased, on the 15th day of August, 1865, in part payment of his indebtedness to the estate. This note was afterwards placed by the defendant in the hands of Pomeroy & Emory, attorneys at law, for collection, and was presented by Mr. Emory for allowance. Mr. Emory testifies, that Cowen, the then administrator of Lenox, and also Wilson, the surety on the note, seemed to be surprised; and Wilson alleged that the note was paid, but that it was allowed, and that after it had been allowed he may have said to them if they could find out that it had been paid, the allowance would be set aside. Wilson, in his testimony, says this conversation with Emory occurred before the allowance. But whether it occurred before or afterwards, there is nothing in the testimony to show that the attorneys had any authority from their client, Seay, to make any such admissions or declarations.

The only evidence of payment of the note consists in the admissions of Trask which seem to have been made about the time, and after he had transferred his note to Eaton. These admissions were to the effect that his note on Lenox had been settled by the Simonds & Lucas deposit, and by a note on Eaton transferred to him by Lenox.

It appears that there was found among the papers of Trask, deceased, the note on Eaton, of date, January 1860, for \$1,276. This was about the amount of the balance then due on the note in controversy. But the note in controversy seems to have been assigned to Abraham Eaton. And there is nothing in the evidence to explain how it got into Eaton's hands

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—that is, what consideration Eaton paid for it. Eaton and Trask both being dead, this matter is left unexplained. We can only surmise that Eaton, as an accommodation to Lenox, gave him his note to be transferred as a payment to Trask, and as security to himself, took an assignment from Trask of the note in controversy. It is very strange that the note, if absolutely paid off, should have been left in Trask's hands or transferred to Eaton. The evidence, therefore, of payment is very unsatisfactory. Besides, there is no pretense in any of the evidence that defendant had any knowledge of the alleged payments, or was in any manner guilty of the fraud charged in the plaintiff's petition. Therefore, in my view, the judgment upon the facts of the case, which was for the defendant, was for the right party, and we are not at liberty to disturb it.

Judgment affirmed; all the judges concur.

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STATE OF MISSOURI, Appellant, *vs.* CURATORS STATE UNIVERSITY, Respondents.

1. *County bonds—Phelps county—Issue of for school of mines, etc.—State Constitution—Injunction, etc.*—The issue of bonds by Phelps county, under the act of January 24th, 1870, (Adj. Sess. Acts, 1870) in aid of the school of mines and metallurgy, at Rolla, was a lending of the credit of the county to a corporation, within the meaning of § 14, Art XI of the State Constitution, and a law authorizing the issue of said bonds without the sanction of two-thirds of the voters of the county was void. That section was not intended to be limited to private corporations, but applies also to those of a public nature.

Where a county orders the issue of such bonds without the popular vote, injunction is the proper remedy.

Appeal from Boone Circuit Court.

Thomas Shackleford, for Appellant.

- I. The suit was properly brought in the name of the State. (State *vs.* Saline County, 51 Mo., 350.)
- II. The defendants are proper parties defendants. (State *vs.* Sanderson, 51 Mo., 203.)

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III. The bonds were issued by the County Court of Phelps, without the assent of the qualified voters of the county, and void. (See State Const., Art. XI, § 14.)

James Taussig, for Respondents.

I. The curators of the University of Missouri are a "public corporation"; an agency of the State, and part of the machinery of the State government. (*Head vs. Curators*, 47 Mo., 222.) Section 14, Art. XI, of the Constitution refers only to private corporations. (*State vs. Wilcox*, 45 Mo., 465.)

Napton, Judge, delivered the opinion of the court.

This action is brought by the State against the curators of the University, the County Court of Phelps county, and the Treasurer of the School of Mines. The petition sets out in detail various provisions of the act of the legislature of February 24, 1870, entitled "an act to locate and dispose of the congressional land grant of July 2, 1862, to endow, support and maintain schools of agriculture and the mechanic arts and a school of mines and metallurgy, and to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life."

This act, as the petition alleges, provides among other things for the establishment of a school of mines and metallurgy, as a branch or part of the University of the State, and is to be located in the mineral district of south-east Missouri, and in a county having mines therein, which shall donate to the Board of Curators of the University for building and other purposes of said school, the greatest available amount of money and bonds, not less than twenty thousand dollars in cash and twenty acres of land, the county to be selected and the school located therein by a committee of the Board of Curators selected for that purpose.

It is then recited that said act further provides, that the County Court of any county in said district is authorized and empowered to issue bonds of the county, in such sums as they may agree upon, to run not longer than twenty years, and

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bear interest, not exceeding ten per cent. per annum, payable semi-annually, which bonds shall be delivered to the Board of Curators, to be by them sold and converted into cash, to be used in the erection of the necessary buildings, buying stock and making improvements, as set forth in § 9 of the act, and buying the land required to be donated therein.

The 12th section of the act is then recited in the petition, which provides, "that in order to raise the amount of money, and to purchase the quantity of land specified in the preceding section, voluntary individual subscriptions may be made and received by the Board of Curators, and the corporate authorities of any city or town and the County Court of any county in the district mentioned in the foregoing section, are hereby authorized and empowered to issue bonds of such city, town or county, in such sums as they may agree upon, to run not longer than twenty years, and bearing interest, not exceeding ten per cent. per annum, payable semi-annually, which bonds shall be delivered to the Board of Curators, to be by them sold and converted into cash, to be used in the erection of the necessary buildings, buying stock and making improvements, as set forth in § 9 of this act, and of the land required to be donated therein, and any such city, town or county shall have power to levy such tax under the constitution and laws of the State, as may be needed to meet, according to the terms of the bonds, the payment regularly of the interest and principal when due."

The 11th section provides that the School of Mines and Metallurgy therein provided for, shall be located in the mineral district of south-east Missouri, but in consideration therefor, any county having mines therein, within such district, shall donate to the Board of Curators for building or other purposes of said school not less than \$20,000 in cash, nor less than 20 acres in land, on which to erect buildings for the use of said school, and lots of mineral land in such quantity, quality, and kind as may be deemed necessary for said school for practical and experimental mining; the title of said land to be clear and indisputable, to be bought without charge to the

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State or to said agricultural college fund, and to be conveyed to the State of Missouri by general warranty deed, etc.

The 12th section of the act provides, that in order to raise the amount of money to purchase the quantity of land specified in the 11th section, voluntary subscriptions may be made, etc., as stated heretofore.

And by the 13th section of said act, the curators were authorized to receive such subscriptions.

On the 13th of June, 1870, the County Court of Phelps county in the State, during the session of said court, made an order donating the bonds of that county to the amount of \$50,000, and the necessary lands for the purpose of securing the location and establishment of said School of Mines within said county.

On the 7th of November, 1870, the county court made a further order to subscribe the further sum of \$25,000 in addition to the amount before donated. The last sum was also to be in county bonds, making the entire subscription of Phelps county \$75,000.

On the 19th day of December, 1870, the curators having before this, by a committee appointed by them, located the School of Mines in Phelps county, the County Court made an order ratifying the subscription of \$75,000, and ordered the issue of bonds to the amount, in denominations of \$1,000 bonds to be delivered to the agent of the curators, to be disposed of by said board for the benefit of said School of Mines; and on the 27th of December, 1870, the County Court of Phelps county issued 75 bonds of \$1,000 each, payable at the Exchange Bank of St. Louis.

The plaintiff, after reciting the provisions of the legislative enactment and the proceedings of the County Court of Phelps county, under it, and the issue of the county bonds to the amount of \$75,000, and their deposit with the curators, avers that the act of the legislature is unconstitutional, if it be construed to allow such subscription and issue of bonds without a vote of the people of Phelps county and the assent of two-thirds of the qualified voters thereof.

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The plaintiff avers that no vote was taken in Phelps county, and that the order of the County Court was made without the assent of two-thirds of the qualified voters, and insists therefore, that the subscription and bonds were void, and that at all events the court should prohibit their being put on the market.

These bonds, it is averred, were issued under the act of the legislature aforesaid, and are now in the hands of the defendants, the curators, or in possession of the treasurer, and have not been sold, but defendants are threatening to sell them, and it is charged, that the County Court is about to levy a tax to pay them; and therefore the court is asked to interfere by injunction and prohibit their sale and the levy of taxes to pay them.

To the petition there was a demurrer, and this demurrer simply raises the question as to the power of the County Court of Phelps county to make this subscription and issue these bonds, without a vote of the people of the county.

The demurrer was sustained by the Circuit Court, and the propriety of the decision is the only question before this court.

There can be no doubt of the right of the State to interfere in this case, since the decision of the Saline county case, (51 Mo., 350) and the Callaway case, (51 Mo., 395).

The principal, indeed the only question in the case, arises on the construction of the 14th section of the 11th article of the Constitution, which provides that "the General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election, to be held therein, shall assent thereto."

It is not pretended that the provision of the Constitution was complied with, but it is urged that the subscription or loan of credit of Phelps county to the University was to a *public* corporation, and therefore not within the meaning of the constitutional restriction.

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That the curators of the University constitute a corporation is not denied, but it is said that this provision of the Constitution was directed solely against subscriptions to private corporations. The language of the section makes no discrimination of the sort, nor does the main purpose of the prohibition require any such discrimination. What was the object of restriction on county courts, city and town municipalities? The object was plainly to prevent them from taxing the people, without their consent. No loan or credit was allowed to *any* company, association or corporation, without the consent of the people who had to pay it. The business of the company, association or corporation is not referred to in the Constitution. Whether educational, benevolent, industrial or otherwise, whether public or private, the object is not considered. It is manifestly the intention of the Constitution to prevent taxation without the assent of the tax-payers and without regard to the purposes of the proposed tax.

What right, then, has this court to interpolate the word "private," into this section of the Constitution? The corporation to which the bonds in question were issued, was in some respects a public corporation, and established for educational purposes—an object always held in high regard by the State; but why is this object, however laudable, to overturn a plain provision of the constitution, or to authorize a taxation which the Constitution forbids?

It may be that the corporation in this case is instituted to perform a more important public enterprise than one which proposes to build a road or bridge, or canal, and it may be that the State has fostered it as a public enterprise. Individual citizens may subscribe to it, but when a County Court undertakes to subscribe and to pay the subscription by county bonds, and by taxation to pay these bonds, it is difficult to see how such subscription and bonds are to occupy any different position from county bonds for any purpose of internal improvement or otherwise. The corporations proposing to build said roads and bridges, etc., are called private corporations, although for many purposes they are regarded as public

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corporations, and in exercising the power of eminent domain undoubtedly exercise a public function granted by the State, and so far are public corporations.

Educational institutions are favorites with the State, but I do not observe that any exception is made in their favor when the Constitution prohibits taxation without a vote and an assent of a prescribed majority. It was thought, no doubt, that the people might as well be consulted in a contribution to a college, as a contribution to a railroad or any other industrial or mechanical enterprise. No discrimination was made by the constitution, and this court is without power to make any. Nothing is said in the Constitution about public corporations as distinguished from private corporations. We are unable to perceive any ground for such discrimination.

The case of the State vs. Wilcox, 45 Mo., 458, and Head vs. Curators of the University, 47 Mo. 222, have been cited, but they have really no bearing on the present case.

It will be observed that this is a case in which the issue of bonds, not authorized by the Constitution, is proposed to be arrested. When the proposed issue is not sanctioned by the requisite vote, we think it a suitable time to prevent the issue. After such bonds have been put upon the market and purchasers have invested in them, the question of their validity depends upon essentially different principles.

Judgment reversed; the other judges concur, except Judge Wagner, who did not sit in the case.

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WILLIAM POTTER, et al., Plaintiffs in Error, *vs.* JONATHAN HERRING, Defendant in Error.

1. *Mortgage—Equity of redemption—Purchase of, by mortgagee.*—A. and B. jointly bought an equity of redemption in a tract of wild land, upon which, A. had a mortgage or a deed of trust. Subsequently A. foreclosed his mortgage and requested B. to join him in the sale under the trust, but B. refused. A. bought at a price greatly below the sum secured to him by the deed of trust. Years after A. died, his administrator sold the land to a stranger who put im-

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provements on it worth \$5,000. B. died also, and his heirs or representatives asked to be considered as tenants in common with these purchasers, on payment of one-half of A.'s bid, not one-half of his debt; *held*, that there was no equity in the bill, without an offer to pay one-half of A.'s debt; *held* further that the refusal of B. to join in the purchase at the trustee's sale—the death of B. and of A.—the sale by A.'s administrator—the purchase by a stranger, and a large investment of money in improvements, would be strong, if not conclusive evidence of an abandonment of the co-tenancy by B., and estop him and his heirs after a long lapse of time.

Error to Saline Circuit Court.

J. R. Vance and Johnson & Botsford, for Plaintiffs in Error.

Thos. Shroyer, for Defendant in Error.

NAPTON, Judge, delivered the opinion of the court.

The widow and administrator of Potter filed their petition in the circuit court of Saline County, alleging in substance, that Durett, the father-in-law of William Potter, and Shroyer were tenants in common of a certain tract of land (describing it) in Saline County; that they became so, by buying under an execution against George W. Allen; that at the time of such purchase, Shroyer had a deed of trust on said land, to secure a judgment of \$2,500 due him by said Allen; that Shroyer had the land sold under this deed, and bought it for \$1,164, and that this bid then indicated the amount of his incumbrance. The plaintiffs then state, that by such purchase, Shroyer became the holder of the legal title for the benefit of himself and Durett, his co-tenant, with the right on Durett's part to remove the lien by paying one-half of the amount then bid by Shroyer. Shroyer's death is then stated, and the sale of the land by his administrator to defendant. Durett's representatives now ask for a decree for one-half of the land on the payment of one-half of \$1,164 dollars. The answer admits the purchase by Shroyer and Durett of Allen's interest, at a sheriff's sale, but states that the consideration was merely nominal; that Shroyer's incumbrance of \$2,500 exceeded the value of the land.

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It is admitted, that Shroyer had the land sold under his incumbrance, but stated that Durrett refused to have anything to do with said sale or to join in his purchase, declaring that the land was not worth the incumbrance; that Allen was then insolvent, and Shroyer had no other security for his debt, but the land in question; that Shroyer made his bid for a mere nominal sum, merely with a view to divest Allen of his equity of redemption and not for the purpose of ascertaining the value of his incumbrance; and the defendant denies that said bid in any way determined the value of the incumbrance; that Durrett refused to join in the purchase and severed his tenancy in common and in law and equity the right of the land vested in Shroyer, and that defendant having purchased from Shroyer's administrator is entitled to said real estate in his own right. The defendant avers that the land was wild and unimproved until he bought it and took possession, and that he has since expended \$5,000 in improvements.

This is the substance of the petition and answer. To the answer there was a demurrer and the demurrer was overruled, and the plaintiff declined to reply and stood upon the demurrer.

The only question in the case is, whether the facts stated in the answer constitute a defense to the petition. Both the petition and the answer are exceedingly defective. No date is given in either to any of the transactions alleged, nor is it stated in the petition, who owned the judgment and execution under which Shroyer and Durrett bought, whether a stranger or the mortgagee, or one of the purchasers. Whilst the answer states several mere legal inferences assumed by the pleader, the question remains whether the facts stated show a defense.

In fact, as the demurrer goes back to the first pleading, the case might be decided on the insufficiency of the petition. In any view of the case it is difficult to see any plausible basis to support the decree which the court is asked to make. It would seem from the petition and answer, that Shroyer and

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Durrett bought at an execution sale against Allen and the equity of redemption owned by Allen, the defendant in the execution. At what time this purchase was made, or in whose favor the execution was, are facts not stated anywhere, nor is any explanation given to account for such a purchase. If the answer is correct, as we must assume, the land of Allen was incumbered at the time by a deed of trust for Shroyer's benefit, to an amount greater than its value. Yet Shroyer is one of the joint purchasers, and if we adopt the fact as true, which the answer alleges, that Allen's equity of redemption was worth nothing, then Shroyer and Durrett united in a purchase of a title of no value whatever, and that is the condition in which the pleadings in the case exhibit it here.

We might conjecture that there was some understanding between Shroyer and Durrett, inconsistent with this assumption, and which induced Shroyer to ask the participation of Durrett in the purchase of this equity, so that Durrett should pay him one-half of his claim against Allen, and he and Durrett divide the land. But no facts are stated to authorize any conjectures about the purchase. Even the year when it was made is not stated. A purchase by the mortgagee, of an equity of redemption sold on an execution in favor of the mortgagee is regarded of no validity and leaves the mortgage still in existence. (McNair vs. O'Fallon, 8 Mo., 188.) But we have no information in regard to this execution under which Shroyer and Durrett bought. The price paid is alleged to have been nominal, and if so, there was doubtless an agreement between them in regard to their future course.

Shroyer ultimately caused a sale under his mortgage or deed of trust and wanted Durrett to join him in bidding for the land, and Durrett refused to have any further connection with the matter. Shroyer's bid at this sale was \$1,000 dollars or thereabouts, and he thus acquired the legal title.

This legal title passed on his death to his heirs, and to pay the debts of the estate, it was sold by his administrator to the defendant. All the parties to the transaction are dead, Shroyer, Durrett and Allen. And now Durrett's representa-

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tives, in behalf of his creditors, ask to be allowed to be considered as a tenant in common with defendant, upon the payment of one-half of \$1,100 or thereabouts, which was Shroyer's bid for the land on the sale made by the trustee.

Considering Shroyer and Durrett as tenants in common of an equity of redemption, to make their title valuable, the first thing for them to do was to extinguish the incumbrance. Durrett was invited to participate in this foreclosure. He refused, and his refusal was really a repudiation of any further interest in the matter. He abandoned whatever arrangements had been agreed upon between himself and Shroyer.

It is clear that the plaintiffs could not have any equity, without paying the half of Shroyer's claim against Allen, which they do not propose to do. But it is also clear, taking the imperfect allegations on both sides as correct, that Durrett abandoned his tenancy in common.

Certainly, after the death of Shroyer, and the death of Durrett, and the sale to the defendant, a court of equity would require a very strong case to allow the purchase of a third person, ignorant of the facts, to be defeated. The law concerning tenants in common and purchases by one, of the outstanding titles, we do not consider applicable to this case.

It is inferrable from the facts stated in the answer, that Durrett had abandoned whatever arrangement may have existed between him and Shroyer in regard to a division of these lands. But if he had not, his representatives can make no claim in equity to the half of these lands without paying for the half of Shroyer's claim. They do not propose this. If they had, I doubt if a court of equity would enforce it against a stranger after a lapse of years. It seems that Durrett, in his life-time, made no offer to pay one-half of Shroyer's incumbrance; that he positively refused to take any part in the foreclosure or sale by the trustee.

This looks like a waiver or abandonment of his tenancy in common, and an estoppel to a subsequent operation of such title after the death of all parties. The descent of the legal title to Shroyer's heirs, and the sale by the administrator to a stranger,

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who had no knowledge of the transaction alleged, and who is not charged to have had, and who has expended large sums in improving the land, would require a much stronger claim than the one set up in this petition, to authorize a transfer of title, by a court of equity.

Judgment affirmed. Judge Adams did not sit in this case; the other judges concur.

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W. B. PRATT, Plaintiff in Error, vs. CAROLINE A. CLARK, et al., Defendants in Error.

1. *Land and land titles—Exchange of lands—Deed of trust—Vendor's lien, etc.*—A. owned a tract of land in the county, and B., a house and lot in the city, incumbered by a debt for \$1,000, secured by deed of trust. They agreed to exchange, and did exchange property with each other, upon the express condition and agreement that upon exchanging titles the incumbrance on the property of B. should be removed, and that such removal should be received in part payment of the property of A., B. having obtained the title from A. by means of such promise, to remove the incumbrance. *Held*, 1st. That the debt which was secured by the deed of trust on the house and lot, would constitute until removed, a vendor's lien on the tract of land conveyed to B., notwithstanding that the deed from B. to A. contained covenants of warranty, for breach of which an action at law might be maintained. 2nd. That such lien is treated as a constructive or implied trust, and therefore not within the statute of frauds.
2. *Vendor's lien enforced, notwithstanding law remedy, etc.*—The right of a vendor to enforce his lien may well, and frequently does, exist contemporaneously with a right of recovery at law, and the jurisdiction always exercised by courts of equity in cases of trust will not be ousted by the fact that courts of law could afford an apparently adequate relief.

Error to Cole Circuit Court.

Edwards & Son, for Plaintiff in Error, cited in argument: *Skinner vs. Purnell*, (52 Mo., 96).

Lay & Belch, for Defendants in Error.

SHERWOOD, Judge, delivered the opinion of the court.

The plaintiff alleged in substance these facts in his petition: that in the year 1870, Henry Eaton and Caroline A. Clark owned lot No. 110 in the city of Jefferson, the legal title to which was in said Caroline A., and was subject to an incumbrance of \$1,000, created by a deed of trust executed by the

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defendant, Mrs. Clark and her husband, since deceased, John Clark, to Henry Eaton as trustee; that plaintiff was at that time the owner of a certain tract known as Pratt's Mills, containing about eleven acres; that plaintiff and Henry Eaton, John Clark and Caroline A. Clark then entered into a parol agreement, whereby plaintiff agreed to convey to Eaton and Mrs. Clark the Mill tract free from incumbrance, in exchange for the property of Mrs. Clark; that the immediate removal of the incumbrance upon the exchange of titles, was the express agreement of the parties, and was to be received in part payment of the real estate then owned by the plaintiff; that plaintiff fully complied with the contract on his part and made to Eaton and Mrs. Clark a conveyance of the Mill tract, but they, although they conveyed to him lot No. 110 by a deed of general warranty, did not and would not remove or cause to be removed the incumbrance on the property conveyed to plaintiff; that plaintiff would not have accepted such conveyance, but upon the express understanding and agreement that such incumbrance should be removed; that defendants were insolvent except as to the property conveyed to them; that they openly avow their determination not to remove the incumbrance, but to leave it as it is; that the defendants had been attempting to sell the Mill tract with the avowed intention of thereby depriving the plaintiff of any lien which he might have on the property which he had conveyed to them, and that the note for \$1,000 secured by the deed of trust had long since fallen due and remained unpaid.

The petition concluded with a prayer that the debt secured by the deed of trust might, with the interest accrued and to accrue, be declared a lien on the property conveyed by plaintiff to Henry Eaton and Mrs. Clark, until such time as they should comply with their contract and remove the aforesaid incumbrance, and also asks for general relief.

The defendants demurred, and the court held the petition insufficient. The correctness of that ruling will now be examined.

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The doctrine of the lien of a vendor of real estate for the unpaid purchase money is a familiar one. This lien like that of a vendee, who prematurely pays the purchase money before the reception of a conveyance of the land he has purchased, is treated as a constructive or implied trust and as raised by implication, and not, therefore, within the purview of the statute of frauds, but excepted from the operation of that statute. (2 Sto. Eq. Jur., §§ 1217, 1218.)

The principle on which this lien, in the nature of a trust, is founded, is, that it would be against conscience to permit a person who has obtained the land of another to keep it and not pay the full consideration money. (*Ibid*, § 1219.)

And the authorities also maintain that this lien or implied trust has "its foundation in the earliest principles of courts of Equity" and exists entirely independent of any agreement between the contracting parties. (§ 1220, and *cas. cit.*; 4 *Kent. Com.*, 152, and *cas. cit.*)

And the taking of covenants from the vendee for the payment of the purchase money will not amount to a waiver of the lien. (4 *Kent.*, 153; 1 *Mason*, 213, and *cas. cit.*) If the acceptance by the vendor of covenants from the vendee for the payment of purchase money, would not amount to a waiver of the lien, most certainly it would seem that such result could not follow the acceptance by the vendor of covenants of general warranty as in the present instance.

These observations will, as I think, effectually dispose of the points raised by defendants' counsel, that the contract was within the statute of frauds; or that it was merged in, and swallowed up by the conveyances which were made between the respective parties; or that a waiver of the lien which a court of equity would, under the circumstances imply, had occurred. And that such a lien exists in the case at bar, an examination of the foregoing authorities and of the allegations of the petition, confessed by the demurrer to be true, will conclusively show.

If Pratt had exchanged the Mill tract for lot 110 and \$1,000 besides, not a particle of doubt would exist, that that

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sum until paid, would remain a lien on the mill tract capable of enforcement in equity. But the essential features of the transaction set forth in the petition are precisely the same as in the case just supposed, for in contemplation of a court of equity which regards substance rather than mere form, the mill tract has not yet been paid for by an amount equal to the incumbrance yet existing on in lot 110. And even if plaintiff had an adequate remedy at law by a suit on the covenants of warranty prior to a breach of those covenants, by reason of an eviction, still this would not preclude him of equitable relief. For the right of a vendor to enforce his lien may well, and frequently does, exist contemporaneously with a right of recovery at law, and the ancient jurisdiction always exercised by courts of equity in cases of a trust, will not be ousted by the fact that courts of law could afford an apparently adequate relief. (1 Sto. Eq. Jur., §§ 64, 80; Stewart vs. Caldwell, 54 Mo., 536.)

For these reasons I am of the opinion that the demurrer should have been overruled. And if, upon a final hearing, it shall appear that the allegations of the petition are true, the court below will proceed in conformity with this opinion.

Judgment reversed and cause remanded; all the judges concur.

—o—

STATE TO USE OF J. GOODWIN, Appellant, *vs.* WM. WILLIAMSON, *et al.*, Respondents.

1. *Judgment—Transcript of—Suit upon—Original writ—Mode of service, etc.*
—In suit brought in this State, on a judgment given in the State of Virginia, the transcript is not rendered inadmissible by reason of the fact that the original writ of summons as shown thereon, was not under seal; and where service of that writ purported to have been made upon the wife of the defendant, at his residence, he not being found at his usual place of abode, etc., the transcript is not inadmissible under a fair construction of the laws of Virginia on account of its failure to show that she was a free white person, nor was it objectionable, as failing to show, that the writ was served at defendant's usual place of abode, or that service was made in the officer's bailiwick.

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It cannot be presumed against the judgment of a court of general jurisdiction, that service was made by an officer of the court outside of the county. At least, such cannot be presumed to be the case in a collateral proceeding.

2. *Evidence—Volume of laws—Certificate of Secretary of State, etc.*—The certificate of the Secretary of State of Virginia, attesting a certain volume of the laws of that commonwealth, stated the title of the book to be "The Code of Virginia," etc., "published pursuant to law." * * Certificate held to show sufficiently that the volume was published by the authority of the State of Virginia.

Appeal from St. Clair Circuit Court.

Burdett & Smith, for Appellant.

Shields and Johnson, for Respondents.

VORIES, Judge, delivered the opinion of the court.

This action was founded on a bond executed by the defendant, William Williamson, as the sheriff of St. Clair county, and by the other defendants as the sureties of Williamson on said bond.

The petition charged the execution of the bond by said sheriff in the sum of five thousand dollars, in the usual form, payable to the State, and that the other defendants were his sureties. The breach of the bond stated in the petition was substantially as follows: That the relator had, on the 17th day of June, 1870, recovered a judgment in the County Court of Botetourt county, State of Virginia, for the sum of \$620.93, with interest and costs, etc., which judgment was recovered against one William P. Bucks; that afterwards, on the 12th day of September, 1870, the said judgment still being unpaid, the relator commenced an action in the St. Clair Circuit Court in the State of Missouri; that said action was founded on, and to recover the amount of said judgment so recovered in Botetourt county, in the State of Virginia, and was commenced against said Bucks by way of attachment, which was duly issued against the property of said Bucks; that said writ of attachment so issued in said cause, was on the day of the issue thereof, placed in the hands of defendant Williamson, as such sheriff of St. Clair county, to be by him

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served and executed according to law; that at the time said writ was so delivered to said Williamson, and for a long time thereafter the said Bucks was the owner of a large tract of land in St. Clair county, Missouri, subject to be levied on by said writ; that at the time said writ of attachment was so delivered to said sheriff, relator caused a written description of said lands to be delivered to said sheriff, with directions to said sheriff to seize and levy on said lands by virtue of said writ; that said sheriff had wholly failed and neglected to levy upon or seize said lands by virtue of said writ, but had retained said writ in his hands until long after the term of his office had expired, failing either to levy the same or deliver it to his successor in office, or to proceed under the same in any manner whatever, until after the said Bucks had sold the land so owned by him in said county to an innocent purchaser, after which said writ was returned unexecuted; and the said Bucks having no other property out of which the debt could be made, the same became wholly lost to relator, etc.

The defendants by their answer admit that the relator commenced an action in the St. Clair Circuit Court, as charged, and that the attachment was issued therein against the said Bucks and his property, which was placed in the hands of defendant Williamson, as sheriff, with a memorandum of the lands upon which it was to be levied as charged in the petition.

The answer then alleges that immediately after the attachment was received by Williamson, he made a memorandum of a levy to be made on the lands of Bucks in his county, as described in the paper handed him with the writ, but that before said levy was indorsed on the writ of attachment, and on the same day that the writ was received by said sheriff, he was directed by one E. J. Smith, who was one of the attorneys of record for the said relator in that suit, to hold the attachment and do no more in regard to the same until further ordered so to do; that no further orders were given him in reference to said writ, by the relator or his attorneys, during the remainder of the official term of said sheriff; that on

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or about the 23rd day of February, 1871, after the said Williamson had ceased to be sheriff of St. Clair County, said E. J. Smith, the attorney of the relator, requested said Williamson to enter said levy—a memorandum of which had been made as aforesaid—upon said writ as of the date on which said writ had come to his hands, to-wit: September 12th, 1870, and a memorandum of the levy made, and that an abstract of the same be returned to the recorder of said county; that on the same day, before the said Williamson was able to have the same indorsed on said writ or said abstract filed, the said attorney Smith requested Williamson to deliver said writ and the petition therewith to him—which was accordingly done. The answer then denies that Williamson ever refused or neglected to levy the writ or make and file the abstract thereof as charged, but he states that the same would have been done but for the orders of said Smith. The other material allegations of the petition were denied by the answer. A replication was filed by the plaintiff, putting in issue the new matter set up in the answer.

A trial of the cause was commenced before a jury, and the plaintiff on his part offered to read in evidence a transcript of a judgment and proceedings had in the County Court of Botetourt County, Virginia, in the case of John Goodwin against William P. Bucks, and in connection with said transcript and in support thereof, the plaintiff also offered in evidence certain certified transcripts or copies of certain acts of the General Assembly of the State of Virginia, certified by the Secretary of the State of Missouri; to the reading of all which in evidence, the defendants objected for the following reasons:

- 1st. Because there is no seal to the writ.
- 2nd. Because it does not show when or where it was served, and does not show that the wife of Bucks is a free white person, nor that it was served at his usual place of abode, nor that it was in the officer's bailiwick.
- 3rd. Because the record does not show that there was any court held at the time judgment was rendered, to-wit: the

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7th of June, 1870, and there is no *consideratum est* therefor at the time judgment purports to have been rendered, and no definite or fixed amount rendered in the pretended judgment.

4th. Because there was no service on W. P. Bucks by the sheriff or sergeant of Botetourt Co., Virginia.

The objection made to the introduction of the certified copies of the law, is: because there was nothing to show that they were printed by the authority of the State of Virginia. The court overruled the objection of the defendants to copies of the law of Virginia and they were admitted, but sustained the objections made to the certified transcript of the judgment and proceedings in the County Court of Botetourt County, Virginia, and excluded the same from the evidence in the cause. To this ruling of the court the plaintiff excepted and took a non-suit with leave to move to set the same aside. A motion was made to set aside the non-suit, which was overruled by the court and final judgment rendered; from which the plaintiff has appealed to this court.

The only real question to be examined by this court in the consideration of this case, is, as to the propriety of the ruling of the Circuit Court, in excluding the transcript of the judgment rendered by the County Court of Botetourt County, State of Virginia, from the evidence offered in the cause. It will therefore be necessary to notice the objections made by the defendants to the introduction of said transcript in evidence.

The first objection to the transcript is, that the writ of summons appearing in the record, and which purports to have been served on the defendant, is not under seal. This may or may not be an irregularity depending on the laws of the State of Virginia; but if an irregularity, the judgment would not be void for that reason, so as to be held so, at least in this collateral way. The courts of Virginia, we must presume, know more about their laws and the force and forms of their process, than we can in this State. (Martin vs. Barron, 37 Mo., 301.)

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The second objection to the record is, that it is not shown that the wife of Bucks is a free white person, nor that the writ was served at his usual place of abode, nor that it was in the officer's bailiwick. The return on the summons, as it appears on the record, is as follows:

"January 27th, 1870.

Executed on Wm. P. Bucks at his residence, by delivering and explaining to his wife an office copy of the within summons, he not being found at his usual place of abode at the time of service.

H. R. BURGER, D. S., for
JOSEPH E. JOHNSON, S. B. C.

The statute of Virginia, read in evidence in reference to the service of process reads as follows:

"Section 6. Any summons or *scire facias* against any person, may be served as a notice is served under the first section of chapter one hundred and sixty-seven, to whom the clerk issuing such process, unless otherwise directed, shall deliver or transmit therewith as many copies thereof as there are persons named therein on whom it is to be served. No judgment by default on a *scire facias* or summons shall be valid if it becomes final within one month after the service of such process."

The first section of chapter 167 reads: "1st. A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person, or if he be not found at his usual place of abode, by delivering such copy, and giving information of its purport to his wife or any white person found there, who is a member of his family and above the age of sixteen years, or if neither he or his wife, nor any such white person be found there, by leaving such copy posted at the front door of said place of abode, etc."

It is insisted by the defendant that the service of the summons appearing in this transcript is not sufficient to give the court jurisdiction of the defendant; that the service does not show that the wife of the defendant was a white member of

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the defendant's family over the age of sixteen years, or that the service was made at the defendant's usual place of abode. It will be seen that the law requires the service to be made on the wife, or any white member of the family, etc. If the service is made on the wife in the manner pointed out by the law, I think it is not required by a fair construction of the law, that it should be stated that she is a white member of the defendant's family. If she is his wife it is sufficient, but if it is on any other member of the family, the fact should be stated in the return that such person is a white member of the family over the age of sixteen years. I think that the fact sufficiently appears that the service was made at the defendant's usual place of abode.

But it is further contended that the return does not show that the service was made in Botetourt county. It cannot be presumed against the judgment of a court of general jurisdiction, that the service was made by an officer of the court outside of his county. At least this could not be assumed in a collateral way. In the case of Wilson vs. Jackson's Adm'r, 10 Mo., 329; the return on the writ was simply, "executed," and it was held to be sufficient, when brought in question in a collateral proceeding. The learned judge who delivered the opinion of the court in that case, uses the following language: "Were we to assume however, that the validity of this return was to be tried by the laws of this State, and not by the laws and usages of the State of Virginia, we are not prepared to say that such return would render the judgment of a court of this State void, when called in question by a suit upon that judgment, or in any collateral proceeding. The question in such case would be, had the party personal notice of suit, or was the writ served upon the person of the defendant, and the question is not upon the sufficiency or insufficiency of the sheriff's return. A writ of *capias* can only be executed by a compliance with its mandate, and the term "executed" can mean nothing more or less than that the officer had complied with the mandates of the writ. It is true he ought to show in what manner he has

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performed this duty, and if his return does not so show how he has executed the writ, it may be quashed. But the legality or illegality of the sheriff's return does not affect the question of jurisdiction. If enough appears from the return to authorize an inference of personal service of the writ, it is a sufficient warrant for the court to proceed, and when those proceedings terminate in a judgment, and that judgment remains unreversed, it is but right to presume every thing in favor of the jurisdiction of the court, if the vagueness of the record leaves any thing at all to presumption."

The above quoted reasoning would seem to dispose of the objection that the return did not show the place of service, and the return does show the time of service. See also Martin v. Barron above referred to; also 16 Mo. 102, 1st Smith's Lead. Cas. 1001, *et seq.*, and cases cited.

In reference to the third ground of objection made by the defendants, it is sufficient to say that it does appear by the record that a court was held at the time judgment was rendered in the cause, and the judgment is entirely sufficient in form.

The only remaining point of objection made by the defendant to the record offered in evidence is, that the return of the sheriff is signed by the name of the deputy sheriff for the sheriff, in place of being signed first by the name of the sheriff by his deputy. This objection is extremely technical, particularly when presented in a collateral proceeding; and it is sufficient to say that this form of subscribing service by the sheriff, when done by a deputy, seems to be the form used and recognized in the courts of the State of Virginia, where no question is made as to its sufficiency. (Rucker vs. Harrison, 6 Mum., 181.)

We are of opinion that the transcript offered in evidence was sufficient, at least in a collateral proceeding, and that it should have been received in evidence.

But it is further contended by the defendants in this court, that the certified copies of the laws of Virginia were improperly admitted, and although that error is not directly brought

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before the court in this proceeding, yet if the court can see that the evidence was improperly admitted, and that the record of the judgment could not have been admitted without the admission of these laws, and that no recovery could have been had, it will then appear that the judgment is for the right party and will not be reversed.

The objection made to the introduction of these laws is, that there is nothing in the certificate of the Secretary of the State to show that they were printed by the authority of the State of Virginia. The title page of the book from which the law is taken is stated in the certificate of the Secretary of State to be as follows: "The Code of Virginia, second edition, including legislation to the year 1860, published pursuant to law. Richmond. Printed by Ritchey, Dunnarant, & Co., 1860.

It seems to me that when a book is published *pursuant* to the laws of Virginia it must purport to be done by the authority of the State. So there seems to be nothing in the objection to certificate.

The judgment is reversed and the cause remanded; the other judges concur.

HELEN E. GOULD, *et al.*, Respondents, *vs.* J. T. CROW, Appellant.

1. *Divorce obtained in Indiana on order of publication—Effect of as to wife's claim of dower.*—A decree of divorce regularly obtained by a husband in Indiana, on an order of publication, without personal service, operates as a divorce in his favor in this State, so as to prevent his wife from claiming her dower in lands owned by him here. The decree when so pronounced is a judgment *in rem* and when not affected by fraud is valid everywhere; but when rendered on an order of publication can have no effect *in personam* extra-territorially.
2. *Divorce for wife's fault—Statute touching—Dower rights.*—The statute of Missouri, barring the wife's claim for dower after divorce granted by reason of her fault, (Wagn. Stat., 541, § 14) applies to all divorces, whether obtained in this or any other State, and whether obtained on personal service or by order of publication.

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*Appeal from Franklin Circuit Court.**Jeffries & Crow, for Appellant.*

I. The judgment if conclusive—as undoubtedly it was—in Indiana, was conclusive everywhere else in this country. (2 Bish. Mar. & Div., p. 706.)

II. The divorce puts an end to all rights depending on the marriage and not actually vested as dower in the wife. (Dobson vs. Butler, 17 Mo., 87; Chenowith vs. Chenowith, 14 Ind., 2.)

A. J. Seay, for Respondents.

I. The Indiana divorce is a foreign judgment, and is subject to the law regulating foreign judgments. (Bouv. Law Die. Vol. I, p. 536.)

It is indispensable that the court which rendered the judgment had “a lawful jurisdiction over the cause, over the thing and over the parties. If the jurisdiction fails as to either, it is treated as a mere nullity, having no obligation and entitled to no respect beyond the domestic tribunals. And this is equally true, whether the proceedings be *in rem* or *in personam*, or *in rem* and also *in personam*.” (Sto. Confl. Laws, § 586, and cases cited; 1 Greenl. Ev., § 450.)

“And if the jurisdiction over the *res* be well founded, but not over the person except as to the *res*, the judgment will not be either conclusive or binding upon the party *in personam*, although it may be *in rem*.” (Sto. Confl. Laws, § 592; Rose vs. Hunely, 4 Cr., p. 268-9; Reel vs. Elder, 62 Penn. St., 308; 9 Wall., 121.)

It is a universal principle of the common law, that any title or interest in the land can only be acquired or lost according to the law of the place where the same is situated. (Sto. Confl. Laws, §§ 186-7, and 365 and cases cited; also §§ 539-43; Waddle vs. Watts, 6 Pet., 387; 7 Cr. U. S., 115; 6 Wheat., 577; 9 Wheat., 465; 10 Wheat., 192; Mansfield vs. McIntyre, 10 Ohio St., 27; Colvin vs. Reed, 55 Penn. St., 375.)

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ADAMS, Judge, delivered the opinion of the court.

This was an action for dower in a lot in the town of Union, in Franklin county, held by the defendant as purchaser from Robt. L. Jeffries, deceased.

Robt. L. Jeffries was the first husband of the plaintiff, Helen E. Gould. He was married to her in Missouri. Afterwards, in 1864, he obtained a divorce from her in the court of common pleas, in Vigo county, in the State of Indiana. She did not join in the conveyance under which the defendant holds the lot.

The defendant set up as a defense to this suit, the Indiana divorce, and the plaintiffs allege that the divorce was obtained by fraud, etc.

When the record of the Indiana divorce suit was offered as evidence by the defendant, the court excluded it and the defendant excepted. There was no evidence offered to impeach the Indiana judgment, and the only material question presented by this appeal is, whether the court erred in excluding it. On its face the record seems to be regular. The petition for the divorce alleges that the applicant, Jeffries, was a *bona fide* resident of Vigo county, in Indiana, at the time he applied for a divorce. It does not allege how long he had resided in that State. It alleges that the said Helen deserted him after he went to Indiana, and does not allege how long the desertion had existed. It also alleges other matters for the divorce.

There was no service of summons on the defendant, but there was an order of publication duly published, and the record of the decree states that the defendant, Helen, appeared by three attorneys, whose names are set forth in the decree. The record shows that the case was heard, and proof given, and upon the proof a decree for a divorce, in due form, was rendered. No plea or answer was put in for the defendant.

It is urged here that the Indiana act of the legislature confers exclusive jurisdiction on the Circuit Court in divorce suits. But the language of the act is not exclusive. The presumption is, as the common pleas court is a court of record.

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and took jurisdiction of the case, that it had the right under the laws of Indiana to hear and determine the case.

There is nothing to show that the attorneys who appeared for the wife had any authority to do so. They did nothing but appear, and I shall consider the case as though the decree had been rendered without any appearance on her part, and simply on order of publication. The formality of such appearance may be required by the Indiana laws, and that may be the reason why the attorneys appeared for her.

As the case stands before us, the judgment being unimpeached, we must consider it as valid under the laws of Indiana. For although the petition does not allege the length of time the plaintiff had been domiciled, nor for how long a time his wife had deserted him, the presumption is that all these matters appeared in proof, and that the court was justified on the evidence in the cause to grant the divorce.

Of course, if Jeffries went to Indiana expressly to obtain the divorce, that would render it fraudulent and void as to his wife, but that question is not before us. Considering that the divorce was regularly obtained on a regular order of publication, did it operate as a divorce in Missouri so as to prevent the wife from claiming dower in the lands of Jeffries in Missouri? That is the question presented by this record for us to determine.

A divorce suit is a proceeding *in rem*. The status of husband and wife is the *res* to be acted on and dissolved by the decree. It is not simply a contract of marriage which is dealt with by a decree of divorce; but it is one of the chief domestic relations—the relation of husband and wife—deriving its rights and duties from a source higher than any contract, and uncontrollable by the parties themselves. The duties and rights derived from this relation are similar to those of parent and child, guardian and ward, and master and servant. After the relation is once established, the contract of marriage has performed its office, and the duties and rights of the parties result from the law and not from the contract. This status or relation attaches to each party, and goes with each to their respective domiciles if they happen to have separate domiciles.

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Some courts hold that the wife cannot have a separate domicile from her husband; but this doctrine has been exploded and the current of authorities is that she may have a separate domicile for the purposes of divorce.

Every State or sovereignty has the right to determine the domestic relations of all persons having their domicile within its territory; and, therefore, where a husband or wife is domiciled within a particular State, the courts of that State can take jurisdiction over the status, and for proper causes act on this *rem* and dissolve the relation.

The decree so pronounced is a judgment *in rem*, and when not affected by fraud, it is valid everywhere, and under the constitution and laws of the United States, such decrees are entitled to full faith and credit in all the States and Territories. But such judgments when rendered on orders of publication, can only have effect upon the thing acted on by the decree, and such rights as are dependent upon that for their existence. Therefore, if a court, in severing the marriage tie, undertakes to render a decree *in personam* as to alimony, it can have no extra-territorial effect.

But the marriage status being acted on and dissolved by the decree, that relation becomes severed, and continues so in all other States and territories, and property rights dependent alone upon its continued existence must cease not only in the State where the decree is rendered, but in all other dominions. After such dissolution, neither party can claim rights dependent upon its continued existence. The husband is no longer entitled to courtesy in the wife's lands, or to recover to his possession her *chooses* in action, and the wife's incomplete right to dower in his lands wherever situated, must cease. (See *Harding vs. Alden*, 9 Me., 140.)

These are the doctrines of the common law. There may be some statutory changes in some of the States, and hence the conflict in the decisions of some of the State courts on these questions.

This is the conclusion arrived at by Bishop in his celebrated treatise on Marriage and Divorce. After a thorough discus-

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sion and citation of authorities, he says: "Still, in the absence of any statutory provision, the unwritten law of our States, in general, does not recognize the status of marriage in a woman who has no husband. Consequently it does not recognize in her the existence of property rights which hang directly upon the status." (See 2 Bish. Mar. & Div., 5 Ed., §§ 155 to 170, inclusive, and the authorities cited.)

By the statute laws of Missouri, if the husband be divorced for the fault of the wife, her right to claim dower in his lands ceases from the time the marriage status is severed. The section of the law referred to reads as follows: "If any woman be divorced from her husband for the fault or misconduct of such husband, she shall not thereby lose her dower; but if the husband be divorced from the wife, for her fault or misconduct, she shall not be endowed." (See Revised Laws 1855, 1 vol. 671, and 1 Wagn. Stat., 541, § 14.)

This section applies to all divorces, whether obtained in this or any other State, and whether obtained on personal service or by order of publication. (See Harding vs. Alden, 9 Me. 140.)

Under this view the court erred in excluding the Indiana divorce.

For this error, the judgment must be reversed and the cause remanded. All the judges concur.

—o—

THE STATE OF MISSOURI, Appellant, *vs.* AMOS W. MAUPIN,
Respondent.

1. *Criminal law—Indictment for forging judge's certificate—Allegations as to county wherein crime occurred, etc.*—An indictment for forging a judge's certificate to a fee bill (Wagn. Stat., 490, § 15,) is not bad by reason of the fact that it charges that the prisoner forged the certificate, and also, that he "caused and procured the same to be forged." The latter clause might be stricken out as surplusage. And under our liberal system of pleading an averment in the indictment, that the forged instrument purported to be

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the certificate of "A. B., judge of the ninth judicial circuit," is sufficient without the further affirmative allegation, that A. B. was judge of that circuit. But the failure of such indictment to set forth in what county or circuit the cause wherein the fee bill issued was tried, or in what county or circuit the costs or fee bill accrued, would render the complaint as fatally defective.

Appeal from Franklin Circuit Court.

Ewing, Atty Gen'l, for Appellant.

I. The additional words "and did procure it to be forged" do not occur in the second count. If these words do render the second count bad on demurrer, or on motion to quash, still as the second count is not obnoxious to that objection, the motion should have been overruled. (State vs. Rector, 11 Mo., 28; State vs. Wilson, 15 Mo., 503; State vs. Woodward, 21 Mo., 265.)

II. But the words objected to do not vitiate the first count. They all charge but one offense. (State vs. Carrigan, 24 Conn., 286; State vs. Batson, 31 Mo., 343; State vs. Palmer, 4 Mo., 453; State vs. Ames, 10 Mo., 743; Hobbs vs. State, 9 Mo., 855.)

III. The count will not be held bad by reason of unnecessary or useless words, after rejecting the words objected to as superfluous. The count is good, and in the exact language of the statute. (State vs. Hamilton, 7 Mo., 300; State vs. Edwards, 19 *Id.*, 647.)

Jones and Lay & Belch, for Respondent.

I. This indictment charges that defendant unlawfully and feloniously did make and forge, and also in same count charges that he procured said instrument to be forged.

It is nowhere averred where the fee bill issued, whether in the office of the clerk of the Franklin Circuit Court, or in some county in the State of Ohio; nor is it averred that D. Q. Gale was judge of the Franklin Circuit Court, nor that N. G. Clark was Circuit Attorney, nor that either were officers of any Court.

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VORIES, Judge, delivered the opinion of the court.

The defendant was indicted in the Franklin Circuit Court for forgery in the 3rd degree.

At the November term of the Franklin Circuit Court, the defendant appeared and filed a motion to quash the indictment for reasons therein stated. This motion was heard by the court and sustained, and final judgment rendered in the cause against the State. The plaintiff excepted to the ruling and judgment of the court, and has appealed to this court.

The only question presented for the consideration of this court is as to the sufficiency of the indictment. The indictment contains two counts, and is in the following form, *to-wit*:

"The grand jurors of the State of Missouri, now here in court duly impaneled, sworn and charged to inquire within and for the body of Franklin County, on their oaths present, that Amos W. Maupin, late of the county and State aforesaid, on the first day of February, in the year of our Lord, one thousand, eight hundred and sixty-nine, at the county and State aforesaid, did, unlawfully and feloniously, falsely make, forge and cause and procure to be forged and counterfeited, a certain instrument of writing purporting to be the certificate of D. Q. Gale, judge of the Ninth Judicial Circuit of the State of Missouri, and of N. G. Clark, Circuit Attorney of the said Ninth Judicial Circuit of the State of Missouri to a certain fee bill purporting to be the fee bill allowed against the State of Missouri, in the case of the State of Missouri against Greenbury Mitchell, which said certificate is in the words and figures following, *to-wit*:

We, the undersigned, Judge and Circuit Attorney, certify, that we have strictly examined the foregoing bill of costs during the sitting of the Circuit Court; that the defendant was tried and acquitted; that the offense was one, punishable solely by imprisonment in the State penitentiary; that the services were rendered for which the charges were made, and that the compensation claimed therefor is given by law as therein charged, and that the State is liable to pay the same, being the sum of one hundred and ninety-three dollars and fifty cents.

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Given under our hand, this, the 6th day of April, 1869,
D. Q. GALE, Judge,

N. G. CLARK, Circuit Attorney,
with intent, then and there, unlawfully and feloniously to injure and defraud the State of Missouri, contrary to the form of the statute in such case made and provided, against the peace and dignity of the State."

"And the jurors aforesaid, on their oaths aforesaid, do further present, that the said Amos W. Maupin, at the county and State aforesaid, on the first day of February, in the year of our Lord, one thousand, eight hundred and sixty-nine, did unlawfully and feloniously falsely make, forge and counterfeit a certain instrument of writing purporting to be the certificate of D. Q. Gale, Judge, and N. G. Clark, Circuit Attorney of the Ninth Judicial Circuit of the State of Missouri, to a certain fee bill purporting to have been allowed against the State of Missouri, in the case of the State of Missouri against Greenbury Mitchell, with intent then and there unlawfully and feloniously to injure and defraud the State of Missouri contrary, etc."

The objections to this indictment raised by the motion to quash and which are insisted on in this court are: 1st—That it is first charged in the indictment that defendant wrongfully and feloniously did make and forge the certificate of the judge and circuit attorney, and in the same count it is charged that he procured said instrument to be forged and counterfeited, and that, therefore, the indictment is double, charging two offenses in the same count; 2nd—It is nowhere charged or affirmatively averred in the indictment, that Gale was Judge of the Ninth Judicial Circuit, or that Clark was Circuit Attorney thereof; 3rd—The indictment charges that a certificate was forged to a fee bill purporting to have been allowed against the State of Missouri, in the case of the State of Missouri against Greenbury Mitchell, etc.; but the indictment fails to state where the case of the State vs. Mitchell was pending, or where, or in what circuit or county the costs or the fee bill accrued or originated.

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There were some other merely technical objections urged against the indictment, which need not be noticed here.

As to the first objection to the indictment above set forth, it is extremely technical, and we think that although the averments are rather inartificially stated, the indictment should not be held bad for that reason. The words "caused and procured to be" might be rejected as surplusage, and at least the whole indictment could not be quashed for that objection alone, as the objection does not apply to the second count of the indictment, where no such double charge appears.

We think that the averments in the indictment as to the fact that Gale was Judge and Clark, was Circuit attorney of the Ninth Judicial Circuit, are, under our present liberal practice, sufficient.

The third objection is of a more serious nature. It is not shown in either count of the indictment, in what county or circuit the case of the State vs. Mitchell was pending, or where the costs or fee bill accrued, to which the certificate was charged to have been forged. It was necessary that the indictment should have shown where said prosecution was pending and the fee bill accrued, so that it would appear that it was in the proper Circuit where the Judge and Circuit Attorney named might have the power to officially certify the same, and so as to notify the defendant of the particular fee bill and the court in which it originated, to which he was charged of forging the certificate.

We think the indictment is fatally defective in this particular, and the judgment must therefore be affirmed. The other judges concur.

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THE STATE OF MISSOURI, Appellant, *vs.* AMOS W. MAUPIN, Respondent.

1. See case *ante* p. 205.

Appeal from Franklin Circuit Court.

VORIES, Judge, delivered the opinion of the court.

This case was heard in connection with the case between the same parties, (*ante* p. 205,) decided at the present term of this court, and is in all of its material circumstances exactly like that case, and for all the reasons given in the opinion in that case the judgment is affirmed. The other judges concur.

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STATE OF MISSOURI, Appellant, *vs.* AMOS W. MAUPIN, Respondent.

1. See case *ante* p. 205.

Appeal from Franklin Circuit Court.

VORIES, Judge, delivered the opinion of the court.

This case was submitted with another case between the same parties, decided at the present term of this court, the two cases being in all of their material circumstances exactly similar.

For the reasons given in the opinion in that case, the judgment in this case is affirmed. The other judges concur.

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STATE OF MISSOURI, Appellant, *vs.* AMOS W. MAUPIN, Respondent.

1. See case *ante* p. 205.

Appeal from Franklin Circuit Court.

VORIES, Judge, delivered the opinion of the court.

This case was submitted with the case between the same parties (*ante* p. 205,) decided at this term of the court, and is in every essential particular, exactly similar in that case. For the reasons given in the opinion of that case the judgment is affirmed. The other judges concur.

Philibert, et al. v. Schmidt, et al.

BENJ. PHILIBERT, *et al.*, Defendants in Error, *vs.* FRANK SCHMIDT, *et al.*, Plaintiffs in Error.

1. *Mechanic's lien—Admissions by builder touching account of material man not evidence against the owner, etc.*—The admissions by a builder acknowledging the correctness of an account rendered for material furnished in building a house, are evidence in a suit thereon against the builder, but not in a suit brought against the owner of the building under the mechanic's lien law.

Error to Cole Circuit Court.

Lay & Belch, and Edwards & Son, for Plaintiffs in Error.

Ewing & Smith, for Defendants in Error.

ADAMS, Judge, delivered the opinion of the court.

This was an action under the mechanic's lien law, brought on an account for materials alleged to have been furnished the defendant, Anton Moeller, as contractor for building a hotel for the defendant, Schmidt, in the City of Jefferson, in the State of Missouri. The defendant, Moeller, having become bankrupt, A. W. Ewing, his assignee, was substituted as defendant.

There were separate answers by the defendants putting in issue the material allegations of the plaintiff's petition.

Upon the trial, the plaintiff introduced evidence tending to prove his account and lien, and conduceing to prove that the materials were furnished under Moeller's contract for building the hotel. Among other evidence, was that of Schmidt's promise to pay the amount of plaintiff's lien after it was filed.

After the close of the evidence the court at the instance of the plaintiffs, gave an instruction to the effect, that if the materials were furnished to the contractor, and were used in the building, the jury must find for the plaintiffs, if they find that the proper notice, etc., was given.

This instruction was objected to, and, standing alone, it might have been objectionable. But the court, at the instance of the defendants, gave an additional instruction presenting their views of the case, which, together with the instruction given for the plaintiff, placed the whole case fairly before the

Philipbert, et al. v. Schmidt, et al.

jury. Other instructions were asked by the defendants, which were refused. As the case, however, was fully and fairly presented to the jury by the instructions above referred to, it is unnecessary to pass upon the refused instructions.

The defendants also objected to a letter that had been written by Moeller to the plaintiffs, and the other admissions made by Moeller, acknowledging the plaintiff's account to be just. These admissions were certainly evidence against Moeller and his assignee in bankruptcy, to establish the plaintiff's demand against them.

Upon the whole case I think the judgment was for the right party, and I see no good reason to disturb it.

Judgment affirmed.

ON MOTION FOR RE-HEARING.

Lay & Belch, for Plaintiffs in Error.

I. In this case the letters were written and the declarations made long after the materials had been purchased and used. Schmidt was no longer the owner's agent, and his letters were inadmissible for any purpose. (Morrison vs. Hancock, 40 Mo., 561.)

Ewing & Smith, for Defendants in Error.

I. Contractors declarations are admissible against the owner, as to the materials which have been received or the amount which may remain due. (Dickerson College vs. Church, 1 Watts & Serg., p. 462.)

II. The promise of Schmidt to pay plaintiff's account was admissible in evidence. (Landis vs. Roger, 59 Penn. (State), 95; Morrison vs. Hancock, 40 Mo., 561.)

ADAMS, Judge, delivered the opinion of the court.

At the last term of this court, a motion for re-hearing was granted in this case. By this motion, our attention was called to a point raised by the fourth instruction asked by the defendant and refused by the court, which was not passed upon in delivering the original opinion.

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We have re-examined the record, and are satisfied the questions discussed in the opinion which resulted in an affirmance were properly decided.

But the defendant's fourth instruction presented the question, whether the admissions of the contractor, Moeller, made verbally, and also by letter written to the plaintiffs, after the purchase of the lumber had been completed, could be used as evidence against the owner of the building to establish plaintiff's lien, or in other words, to prove that the materials purchased went into the building under Moeller's contract with Schmidt.

In the opinion delivered, the court decided that this evidence was competent as against Moeller, but the point, whether it could be considered by the jury as against Schmidt, the owner of the building was not passed on.

Whatever may be the powers of a contractor to bind the owner of a building in the purchase of materials, they cease as soon as the purchases are fully completed.

Before the admissions and declarations of Moeller, referred to, were made, the purchase from the plaintiffs had all been completed, and he no longer continued the agent of Schmidt to bind him by such admissions.

In *Dickerson College vs. Church*, (1 Watts & Serg., 462,) this very point was before the Supreme Court of Pennsylvania, and that court decided that such declarations could not be read as evidence to prove that the materials were furnished on the credit of the building. We think the court below erred in refusing the defendant's fourth instruction.

For this error the judgment must be reversed and the cause remanded; the other judges concur.

McClurg v. Phillips, et al.

J. N. McClurg, Appellant, vs. JESSE A. PHILLIPS, et al., Respondents.

I. Mortgages not under seal, when recorded impart notice.—Under a proper construction of the several sections of the statute touching conveyances, (Wagn. Stat., p. 273, § 7; p. 277, §§ 24, 25, 26,) the registration of a mortgage, although having no seal or serawl attached, nevertheless imparts notice. The registration law was intended to embrace not only legal conveyances, but all instruments in writing affecting real estate in law or equity.

Appeal from Webster Circuit Court.

E. G. Mitchell, for Appellant.

I. The instrument sued on is a good equitable mortgage, created a valid lien on the land in question, and can be enforced against the mortgagor and all subsequent purchasers having notice of its existence or contents. (McClurg vs. Phillips, 49 Mo., 315; Gill vs. Clark, 54 Mo., 415.) An equitable mortgage is a writing whereby the lands in question are "affected in equity." (Wagn. Stat., 277, § 24.)

II. The same was properly acknowledged and recorded, and hence imparted notice. (Wagn. Stat., 277, § 25.)

Massey, McAfee & Phelps, for Respondents.

The recording of the unsealed mortgage is not notice, to Paul, of plaintiff's equitable mortgage, and Paul having no actual notice and having a sheriff's deed the judgment should be affirmed. "All deeds or other conveyances of lands or of any estate or interest therein, shall be subscribed and sealed by the party granting the same, etc." (Wagn. Stat., 273, § 7; 272, § 1.) "Every such instrument, from the time of filing the same with the recorder for record, imparts notice." (Wagn. Stat., 277, § 25.)

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in equity to foreclose an equitable mortgage. The mortgage was executed by the defendant, Phillips to the plaintiff, in the year 1860, to secure a promissory note which was given at the same time.

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The mortgage covered several tracts of land in Webster County, and was duly acknowledged and recorded in Webster County. It was in the shape of a legal mortgage in all respects, except that it was not under seal and had no scrawl affixed by way of seal.

In 1867, the defendant, Paul, purchased part of the mortgaged premises at execution sale against the defendant, Phillips, and took the sheriff's deed therefor in regular form. He claims to be an innocent purchaser for value, without any notice whatever, of the plaintiff's mortgage. The proof showed that he had no notice, in fact or otherwise, except what may have been imparted by the registry of the mortgage. The court decided that inasmuch as the mortgage was not a sealed instrument, the registry imparted no notice, and gave judgment releasing the lands claimed by the defendant, Paul, from the mortgage. The only point raised by the record is, whether our registry act applies to equitable, as well as legal instruments affecting real estate.

In construing the act we must look at the whole law and bring together the several sections bearing on the question. Section 7 (1 Wagn. Stat., 273) provides that "all deeds or other conveyance of lands or of any estate or interest therein, shall be subscribed and sealed by the party granting the same or by his lawful agent, and shall be duly acknowledged or proved and certified in the same manner hereinafter prescribed."

Section 24 (1 Wagn. Stat., 277) provides: "Every instrument of writing that conveys any real estate, or whereby any real estate may be affected in law or equity, proved or acknowledged and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

Section 25 provides, that "Every such instrument in writing certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, and all subsequent purchasers and mortgagees

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shall be deemed in law and equity to purchase with notice." (1 Wagn. Stat., 277.)

Section 26 provides, that "No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record." (1 Wagn. Stat., 277.)

These several sections of the registry act clearly indicate that it was the intention to embrace not only legal conveyances or sealed instruments, but all instruments in writing affecting real estate in law or equity. There is no reason why contracts not under seal, affecting real estate as well as sealed instruments or technical conveyances, should not be recorded. The object of the registry act was to abolish the equitable doctrine of notice in regard to all instruments in writing affecting real estate.

That doctrine was, that the party was bound to take notice when the facts were sufficient to put him on inquiry. By the registry act the instrument is void except between the parties thereto, and those who have actual notice, until the same is deposited with the recorder. When so deposited, the registry imparts notice, and every subsequent purchaser or mortgagee is deemed in law and equity to have notice, whether such be the fact or not. When the instrument is deposited with the recorder, the question of notice is put at rest. Therefore, as the plaintiff's equitable mortgage had been duly recorded before Paul purchased, it imparted notice to him, and whether he had notice in fact or not, was a question that could not be raised. His purchase extended only to the equity of redemption left in Phillips, and did not affect the rights of the plaintiff.

This leads to a reversal. Let the judgment be reversed and the cause remanded. Judge Sherwood did not sit; the other judges concur.

State to use Lovell v. Todd.

STATE TO USE OF JAMES B. LOVELL, Plaintiff in Error, vs. J. C. TODD, Defendant in Error.

1. Curator—Final settlement—Suit by sureties against public administrator.—The final settlement of a curator with his ward is a lien on the real estate of the curator, to the extent of the indebtedness shown by the settlement; and the failure of a public administrator having the curator's estate in charge, to state the fact of such lien in his petition for the sale of the land, as required by statute, (Wagn. Stat., 95, § 11) would constitute a breach of his bond, but would not render him liable thereon to the sureties on the curator's bond for the sums they had been compelled to pay by reason of the default of the curator. The damages on such proceeding would be too remote and consequential.

Error to Morgan Circuit Court.

James A. Spurlock and Ewing & Smith, for Plaintiff in Error.

I. It is contended for the plaintiff in error, that the settlement made by the guardian in September, 1860, was a judgment and a lien on the guardian's land, and as such should have been taken notice of in the petition for the sale of the land; (Wagn. Stat., § 11, p. 95) and should have been paid without regard to the order of allowance. (Kerr's Adm'r vs. Wimer, 40 Mo., 544.)

II. The bond sued on in this case, contains all the conditions required by law, and the redundant parts are to be treated as surplusage. (Woods vs. State, &c., 10 Mo., 698.)

Ross, for Defendant in Error.

SHERWOOD, Judge, delivered the opinion of the court.

A guardian and curator of certain wards, having made in the year 1860 a final settlement showing an indebtedness to his wards of some \$1400, in the course of a few years died possessed of land to the value of \$1500, and of personal property worth \$1200. The public administrator took charge of the curator's estate, administered thereon, filed a petition and obtained an order for the sale of the real estate of the curator, (which was bound by the lien of the final settlement to the extent of the foregoing indebtedness) for the payment of

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debts, and in the year 1867 sold the land for \$1495, and applied that sum to the payment of debts in the 5th and 6th class, and the proceeds of the sale of the personal property to the payment of other debts, to the entire exclusion of the above mentioned judgment lien; and although fully apprized of the existence of such lien, did not state that fact in his petition for the order of sale.

The wards subsequently brought suit against the sureties on the bond of their curator, recovered a large sum, and this suit is brought by one of those sureties against the public administrator on his bond, and it is claimed in the petition filed in the cause, that the conduct of the public administrator in the particulars mentioned, constituted such a breach of his bond as rendered him liable at the suit of the surety for whose use this action is brought.

The court below held otherwise on demurrer, and this brings the sufficiency of the petition under discussion.

While it may be conceded that the final settlement referred to was of that character which would constitute a lien on the realty of the curator to the extent of his indebtedness to his wards, and that the duty of the public administrator was precisely the same in the premises, as though the lien had been created by a judgment in the ordinary course of procedure, and that he was guilty of a manifest breach of his bond in failing to act in accordance with the provisions of § 11, p. 95, 1 Wagn. Stat., yet it by no means follows, that by his failure of duty in this regard, he is liable on his bond at the suit of the surety who has been compelled to pay money at the suit of the wards. And the reason for this is, that the injury inflicted by the acts of the public administrator is too remote, and altogether in the nature of consequential damages. And it must be remembered that there is no privity between the surety on the curator's bond and the persons sued in the present case.

If A., being indebted to B. in the sum of \$1000, holds a claim against the estate of C. for that amount, which claim is lost by reason of C's. administrator committing a breach of

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his bond, scarcely any one would have the temerity to contend that this state of facts would give a cause of action on the administrator's bond in behalf of B., even if he should lose his debt against A. in consequence of the latter being unable to collect his claim against the estate of C.; and yet the principle is precisely the same in the supposed case, as in that at bar. For these reasons the petition was very properly held insufficient, notwithstanding the fact that breaches of the bond of the public administrator had occurred.

Whether in an appropriate proceeding, the sureties on the curator's bond could be so subrogated as to avail themselves of the lien which was created on the realty of the curator by reason of his final settlement; or whether a court of equity would even go so far as to afford relief in case the lien mentioned be lost in consequence of lapse of time or otherwise, by allowing redress to be afforded in accordance with the terms of the bond, whose conditions have been broken, are questions the necessity of whose discussion this record does not present.

Judgment affirmed; all the judges concur.

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LOUIS HAMMERSLOUGH, et al. Respondents, *vs.* CITY OF KANSAS, Appellant.

1. *Streets—Opening of—Non-payment for land taken for, what remedy proper.*—Where city authorities condemn a lot and are preparing the same for a public street, but fail to make payment for the land, injunction restraining the city from using it, until paid for, is improper. The remedy, if the owner claims the sale to be void, is ejectment; if valid, suit for the purchase money.

Appeal from Jackson Circuit Court.

J. Brumback, for Appellant.

I. Respondents had an adequate remedy at law and therefore were not entitled to relief in equity. The city was bound to pay for the lot under the agreement. Is not an action to recover

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the price with interest, an adequate remedy; or, if the agreement be void, as there was no written contract of sale, is not an action to recover for damages the entire value of the property, an adequate remedy? (Mueller vs. St. L. & I. M. R. R. Co., 31 Mo., 262; Soulard vs. St. Louis, 36 Mo., 546.)

Is not an action of ejectment to recover possession of the land with damages, an adequate remedy? (Burnett vs. Caldwell, 9 Wall., 591.)

The petition does not state that the city was injuring the land, nor that preparing the lot for use as a street, was such an injury as raised an equity for an injunction. The circumstances of there having been an ordinance condemning the property cuts no figure, neither party relying on it.

Again, the city disclosed facts which raised a counter equity in its favor, to prevent the granting of an injunction. The ground was part of an important street, built up and improved by citizens, graded and fitted for public use by the city, at a considerable expense.

In such case specially should respondents be left to their remedy at law. An injunction operates harshly. (Pratt vs. Bates, 40 N. Y., 166; Ewing vs. St. Louis, 5 Wall., 418; Redf. Railw., [2 Ed.] Ch. 27, § 2, pp. 478-81, and cases cited.)

Karnes & Ess, for Respondents.

As a matter of law appellant is not entitled to specific execution unless it performs its part of the contract. If it asks equity, it must do equity. It is not entitled to the decree asked in its answer until it makes payment or offers to do so.

Ejectment will not lie. (Child vs. Chappell, 5 Seld., 246; Jackson vs. May, 16 Johns., 184.)

Respondents are not bound to proceed in trespass. An injunction will lie in just such cases as this. (Lumsden vs. City of Milwaukie, 8 Wis., 485, and authorities cited by the court: Mohawk & Hudson R. R. Co vs. Archer & Paige Ch., 83, *et seq.*; and cases cited in opinion of court; 2nd Sto., Eq., §§ 927, 928, and note; New York Print. & Dy. Est., vs. Fitch,

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1 Paige, Ch., 97; Lewis vs. Rough, 26 Ind., 398; Sidener vs. Norristown R. R. Co., 23 Ind., 623; Smith vs. Bangs, 15 Ill., 400; Varriek vs. New York, 4 Johns. Ch., p.55.)

NAPTON, Judge, delivered the opinion of the court.

The plaintiff brought an action in the Common Pleas Court of Kansas City, to enjoin the city from using a lot of plaintiffs as a street until it was paid for. The petition was filed in 1869. It alleges that in 1867, the plaintiffs owned lot No 4 in Krey's sub-division and had possession, when the city passed an ordinance condemning the lot as a street; that the city in 1869 was preparing the lot as a public highway without consent of the plaintiffs, and without paying any damages.

The answer sets up an agreement with the city authorities to convey the lot to the city for \$75 per foot front, with interest at 10 per cent. from Sept. 1867, and avers, that the city has ever been ready and is now willing to pay this for the lot and tendering the amount due for the lot, that the city has improved the lot and prays that the plaintiffs convey.

At the hearing it was admitted that the plaintiffs agreed with the city Mayor to sell the lot for \$75 per foot and 10 per cent. interest from date of agreement, but the money was not paid.

The city commenced work on the lot in 1869. The finding of the court was, that the city did not pay for the lot, and therefore grants a perpetual injunction.

The remedy of the plaintiffs, if they claim the sale to the city as void, was an action of ejectment, and if they admitted the sale, they could sue for the purchase money. We see no grounds for an injunction. The plaintiffs are willing to accept a judgment for the purchase money and interest, and undoubtedly they are entitled to this, but the court has no power to give such a judgment.

The judgment is therefore reversed and the cause remanded.

Stemmons v. Carey.

F. B. STEMMONS, Respondent, *vs.* **R. B. CAREY**, Appellant.

1. Justices' courts—Formal judgment unnecessary in.—In trials in justices' courts a verdict will be held as a judgment, and the entry of a formal judgment is not required.

Appeal from Jasper Court of Common Pleas.

Harrison & Montague, for Appellant.

W. H Phelps, for Respondent.

NAPTON, Judge, delivered the opinion of the court

This action was brought before a justice, upon an account filed for \$32.00; the items being four tons of hay at \$8.00 per ton.

Upon the trial in the justice's court, the jury found for the defendant, and thereupon the justice entered on his docket, "It is therefore adjudged by me that the plaintiffs pay the costs herein expended."

On the trial in the Circuit Court, the plaintiffs obtained a verdict for \$25.00. There was a motion for a new trial, and a motion in arrest, but as the bill of exceptions does not show the evidence in the case, nor the instructions, the only points arising here are: first, that there was no formal judgment entered by the justice, and, secondly, that there was no statement of facts constituting the cause of action before the justice. As none of the evidence is before us, it is impossible for the court to see whether the cause of action was correctly stated or not, and in regard to the judgment for costs not being a final judgment, it was held at a very early period, that on trials in a justice's court the mere verdict of the jury would be held a judgment, (3 Mo., p. 12) and the entry of a formal judgment is not required as in courts of record. (See *Hazeltine vs. Rensch*, 51 Mo., 51.)

The judgment is affirmed.

Pacific R. R. Co. v. County Clerk of Franklin Co.

PACIFIC R. R. Co., Appellant, vs. THE COUNTY CLERK OF FRANKLIN CO., Respondent.

1. *Revenue—County Board of equalization—Railroad assessments—Entries on assessment book by deputy county clerk of previous years—Assessment.*—An entry correcting the books of the county assessor, is not objectionable merely by reason of the fact that the entry, instead of being made by the county clerk, was made by his deputy, nor by reason of the fact that the order of the County Board of Equalization, directing the assessment to be placed on the assessor's books, was entered on the journal of its proceedings, after the adjournment and dissolution of the Board, nor by reason of the fact that the assessment, having been omitted by mistake, was entered the year subsequent without notice of the time of the entry.

Appeal from Franklin Circuit Court.

Baker & Litton, for Appellant.

I. The court committed error in allowing the entry made by Miller in the record of the proceedings of the county Board of Equalization, after the institution of this suit, and more than eight months after that board had adjourned *sine die*, and the record of their proceedings had been written out and signed as the true record of all their proceedings. The clerk had no authority to make the entry. The law does not allow taxes to be increased \$738,000 by the mere verbal statement of an irresponsible clerk.

II. The powers and authority of the Board are defined in the statute, (2 Wagn. Stat., 1163, §§ 16, 19). They have no authority to assess property or to do anything except change the amount of assessments that have already been made, and any other action is a nullity. (Pac. R. R. Co. vs. Cass Co., 53 Mo., 17.)

In this as in the Cass county case, no notice either by advertisement or otherwise was ever given the relator. This alone makes the action of the board a nullity.

Even if the Board had had authority to make assessments of property, which the assessor for any year had failed to assess, they could not assess the property for the year 1870, because it had been duly assessed by the assessor for that year. (See Wagn. Stat., 1173, § 40.)

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Even if the county Board had made the order, their secretary had no authority to make the entry on the assessor's book. Such change must be made by the assessor himself. (Wagn. Stat., 1163, § 19.)

The assessor cannot make entries in his books after he returns them. (Wagn. Stat., 1173, §§ 40, 42.)

Seay & Kiskaddon, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This was an application to the Circuit Court for a mandamus ordering the clerk of the County Court of Franklin county to erase from the assessment books of the county assessor, made for the levying of taxes for the year 1871, and returned by said assessor to the County Court on the 6th day of February, 1871, an alleged interpolation in said assessment books, in these words: "The Pacific R. R. Co. assessed for 1873—\$738,000."

It is not necessary to an understanding of the case that the pleadings should be recited. The facts are sufficiently developed in the testimony of C. H. Miller, who was a deputy of the county clerk.

It seems that the board of equalization for Franklin county, composed of the presiding justice of the County Court, the county assessor and county surveyor, and the clerk, met in April 1871, and that Miller acted as their clerk. It was his business to keep a record of these proceedings. The board had ordered him to put in the assessment book of 1871, the assessment of 1870, on the Pacific Railroad, which had been omitted to be collected, and had not in fact been given to the collector.

Mr. Miller made the entry in the assessment book as directed, but omitted to keep a record of the order authorizing him so to do; but upon the suggestion of A. J. Seavy, the county attorney, who advised him that it was his duty to make out a true copy of the proceedings of the board, he, some months after the adjournment of the board made the following entry—"It appearing to the satisfaction of the board of equalization, that the Pacific R. R. Co. of Missouri was law-

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fully and regularly assessed by the assessor of Franklin county for the year 1870, and valued in the aggregate sum of \$738,000, and by him duly certified to the clerk of the County Court of said county of Franklin, for the year 1870, and it further appearing to the satisfaction of said board that the said clerk omitted to certify the same to the collector for that year (1870), by reason of misapprehension of the law defining his duties in the premises, and that the taxes for the year 1870 have not been paid—it is therefore ordered and considered by the board that the clerk of the County Court adjust the tax books by placing upon the assessor's books for 1871, and certifying to the collector of Franklin county on the tax book for 1871, the said assessment so omitted for the year 1870."

This was objected to on the ground that Miller, the deputy, could not act as clerk of the board, whilst the law required the county clerk to act in this capacity, and because the entry of the order was made some months after the adjournment and dissolution of that board.

The court refused the peremptory mandamus.

It is scarcely necessary to observe that these objections, and others of a similar character, are purely technical. It is perfectly manifest that the intent of the legislatures in their revenue laws has been to require the payment of the taxes in each year, and to require assessors and collectors to assess and collect taxes which have been omitted by accident or mistake to be collected in preceding years. The board of equalization is authorized to correct and adjust the tax books.

It is objected that the petitioner had no notice of the action of the board, and that the petitioner was as much entitled to notice, where an assessment was made *de novo*, as where an assessment by the assessor was raised. The petitioner was fully aware that no taxes had been paid in 1870; for if paid, the receipt for the same would have settled the controversy. The position that the board had no power to correct the omissions of the clerk in certifying the assessment for 1871 is untenable.

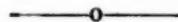
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The fact that the tax assessed for 1870 was never collected is conceded. It is also conceded, that this tax could be collected under the revenue laws in subsequent years. The objections, to the form and mode on which the assessment was placed in subsequent assessments, whatever merits they may have, can only at best, delay the collection of the tax.

These objections are mainly, that the deputy clerk could not act as clerk of the board of equalization, that the board could not correct an omission of the clerk, that the clerk of the board could not make up records of the board adjourned, and that the oral order of the board amounted to nothing, unless recorded at the time.

No one of these objections apply to the merits of the case. The real question is, whether this road was assessed in 1870, and whether that assessment was collected—and it is conceded that it was not. It was assessed, but by accident or inadvertence the assessment was not reported to the collector, and by reason of this omission the road escaped taxation. But private citizens have to pay taxes for years in which their assessments are neglected to be collected, and the same rule applies to corporations.

The judgment of the Circuit court is therefore affirmed; the other judges concur.



EBENZER M. WORLEY, Respondent *vs.* MORGAN DRYDEN, Appellant.

1. *Deed absolute on its face intended as a mortgage—Nature and amount of proof required.*—Although a deed may be absolute on its face, yet if it be shown that it was given merely as a security for debt, courts of equity will decree it to be a mortgage with the right of redemption. And no agreement of the parties can take away that right. But the burden of proof is upon the party who alleges that such a deed is a mortgage, and the proof must be clear and convincing, leaving no room for reasonable doubt as to that fact.

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*Appeal from Bates Circuit Court.**Bassett & Hicks, for Appellant.*

I. There are no averments in the petition of fraud, mistake, surprise or inadequacy of price in making the contract as expressed in the deed, or in the execution of the same. And these are the only cases in which parol evidence is admissible in equity against the contract specified in the deed. (Stephens vs. Cooper, 1 Johns. Ch., 428; Wells vs. Rice, 1 Hill, 602; 6 Hill, 220; Watkins vs. Sockett, 6 Har. J., 444; 1 Sandf. Ch., 38; Parker vs. Vick, 2 Dev. & Battle, 195; Lyons vs. Richmond, 2 Johns. Ch., 57; Salatut vs. Schmidt, 1 Spears E., 421; Greenwood vs. Eldridge, adm'r, 1 Green. C., 165.)

II. The testimony of Worley as to what took place when he delivered the deed to Dryden was incompetent, and no decree could be founded in part or in whole thereon. Neither at law or in equity can parol evidence be received to show that a deed, absolute on its face, was agreed to be, or was a mortgage when the parties intended that the instrument should be in the form in which it is. (Cook vs. Easton, 16 Barb., 429; Webb vs. Rice, 1 Hill, 610.)

III. The parol evidence offered was, at all events, not sufficient to change the deed, absolute on its face, into a mortgage.

In the case of Allen vs. McRea, 4 Ired., 335, Judge Ruffin said: "An absolute deed is not, indeed, conclusive that there was an absolute purchase, but it is almost so, and can only be avoided by some admissions of the defendant in his answer, or by a chain of circumstances that render it almost as certain that it was intended as a security, or if it had been expressed in the deed, such as the disparity between the sum advanced, and the value of the property, the continual possession of the former owner, etc. But there is no case, we believe, in which relief has been given upon mere proofs by witnesses of declarations by the party in opposition to the deed and answer." (See Aborn vs. Barrett, 2 Blackf., 101.)

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R. Adams & W: P. Johnson, for Respondent.

A deed, though absolute on its face, if intended and received merely as a security for a debt, is a mortgage. The evidence in this case undoubtedly shows, that the deed made by Worley to Dryden, although absolute on its face, was intended to secure Dryden for the amount advanced to Worley. This is a case in which the intention of the parties and the nature of the transaction between them must be determined not merely from the face of the deed, but by all the circumstances attending the transaction. In order to ascertain the intention of the parties, the court will not only look to the deed and writings, but to all the circumstances of the contract. (See *Brant vs. Robertson*, 16 Mo., 129; *Wilson vs. Drunite*, 21 Mo., 325; 4 *Kent*, 9 Ed., 177-8; *Renick vs. Price*, 6 *Am.*, 268; *Henry vs. Davis*, 7 *Johns. Ch.*, 40; *Clark vs. Cowan*, 2 *Cowan*, 324; *Marks vs. Bell*, 1 *Johns. Ch.*, 594; *Stevens vs. Stewart*, 4 *Johns. Ch.*, 167; *Whittock vs. Kane*, 4 *Paige*, 203; *Slee vs. Manhattan Co.*, 1 *Paige*, 48; *Van Barn vs. Olmstead*, 5 *Paige*, 9; *Van Barn vs. Russell*, 3 *Barb., Ch.*, 325; *McIntyre vs. Humphreys*, Hoff., 31.)

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding in the nature of a bill in equity to have a deed absolute and unconditional on its face, for certain lands lying in Bates County, made by the plaintiff to the defendant, declared a mortgage, and asking that plaintiff might be permitted to redeem.

The petition alleges, that in November, 1858, plaintiff being indebted to defendant in the sum of four hundred and two dollars for money loaned, executed to him a deed for the land therein described; that the deed so made, although absolute on its face, and purporting to convey, unconditionally, all the right, title and interest that the plaintiff had to the land, was only made for the purpose of securing the amount therein specified, of four hundred and two dollars, money loaned by defendant to plaintiff, together with interest there-

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on, from the time of making and delivering said deed at the rate of ten per cent. per annum, and with the distinct and express understanding and agreement by and between the plaintiff and defendant, that plaintiff should be allowed to redeem the land upon full payment of the indebtedness, and all the interest accrued thereon. There is, then, an averment that in May, 1869, defendant sold to one Speaks, a portion of the land, and that Speaks was an innocent purchaser, having no notice of the claim of the plaintiff, and that he had a good title. The petition then states, that since the execution and delivery of the deed, plaintiff has often and repeatedly offered to pay defendant the indebtedness, with all the interest accrued thereon and all the reasonable expenses that he had incurred, and requested the defendant to accept the same and allow him to redeem the land, but that he refused and fraudulently set up that he was the legal owner of the land, and that plaintiff had no right to redeem. Plaintiff, therefore, prayed that he might be allowed to redeem the land, except that sold; that an account might be taken to ascertain the amount due from plaintiff to defendant after deducting the amount received from Speaks, and that in the adjustment of the account plaintiff should have credit, and be allowed all just sums to which he might be entitled, etc.

Defendant, in his answer, denied that in November, 1858, or at any other time, plaintiff was indebted to him, in the sum of four hundred and two dollars or any other sum of money loaned, or that plaintiff being so indebted to him executed the deed in the petition mentioned, as a mortgage to secure the payment thereof. He denied that the deed so executed and delivered to him by plaintiff, was, at the time the same was delivered, agreed or intended to be a mortgage to secure the payment of money loaned. The answer then averred the fact to be that in November, 1858, plaintiff, in consideration of the sum of money mentioned, granted, bargained and sold to the defendant the land in question, and in pursuance of such sale, executed and delivered to him the deed; that the deed was absolute and unconditional, and was so in-

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tended to be by the parties, the terms thereof being in accordance with the bargain and agreement entered into. When the case came on to be heard, the court, upon the pleadings and proofs adduced, decreed that the deed was intended to be a mortgage, being given to secure the payment of money loaned ; and from this decree the defendant appealed.

An account was then taken between the parties, and the defendant was allowed for the taxes that he had paid and improvements made on the land, which allowance was decreed to be a lien on the land in his favor, and from this decree the plaintiff also appealed to this court. The main evidence in the case is that given by the parties to the record, the plaintiff and defendant, and they directly contradict each other. The plaintiff swears that the money which he received was a loan, and that he conveyed the land only to secure its payment ; that he was to repay the money in either one or two years with interest, and then the defendant was to convey the land back to him. He testifies, that during all the time that intervened between the making of the conveyance and the demand in 1869, in which he was to be permitted to redeem, he wrote but one letter to the defendant on the subject, and that he received no answer to that. He also states that he paid no taxes on the land, and it is fully shown that defendant paid the taxes and exercised ownership over the land from the time it was conveyed to him till the commencement of this suit.

Plaintiff, in addition to his own testimony, introduced witnesses to prove the admissions of the defendant in reference to the transaction. But their evidence, with the exception of that of Mrs. Chaney, was of little or no importance. They had a distant or dim recollection of hearing the defendant say that he had loaned money to plaintiff, and had taken a mortgage on his land for security, but on cross-examination they admitted that they really knew nothing about it. Mrs. Chaney, however, testified, that she had heard defendant say that he had loaned plaintiff upwards of three hundred dollars, and had taken a mortgage on the land in Bates County, to

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secure its payment, and that he expected that he would get the land, as he did not believe the plaintiff would have the money to repay him.

Defendant, in his testimony, positively denies that he ever made any such statement, and contradicts entirely the evidence of the plaintiff. The evidence of the plaintiff is surely not satisfactory in support of his claim. Nearly eleven years elapsed before he paid any attention to the subject, or took any interest in the redemption of the lands. During all that time defendant was in possession, paying taxes and keeping down incumbrances. It is true, he says, that he did not know where defendant could be found. But this seems improbable. When the conveyance was made and the money delivered to plaintiff, both plaintiff and defendant were living in Buchanan county. This was in the Fall of 1858.

Defendant continued to reside there, in the same place till the Summer of 1865, a period of seven years, when he removed to Holt, an adjoining county, and from thence he removed to Cass county where he still resides. At any time then, within seven years, defendant might have been found at his old residence where he lived when the bargain between the parties was made, and, undoubtedly, after that time any inquiry among his former neighbors would have disclosed his new place of abode.

This laches of the plaintiff and neglect to assert any title to, or interest in, the land for such a length of time is not easily reconcilable with any good or meritorious claim in him.

As regards the law in the case there is no difficulty where the facts are clear, although the deed may be absolute on its face. Yet if it be shown that it was given merely as a security for a debt, courts of equity will decree it to be a mortgage which carries with it the inseparable incident of the right of redemption.

Thus in *Brant vs. Robertson*, (16 Mo., 129,) it was said that it may be taken as universally true in law, that no conveyance can be a mortgage, unless it is made for the purpose

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of securing the payment of a debt or the performance of a duty, either existing at the time the conveyance is made, or to be created, or to arise in the future. If the payment of money is the object of the security or conveyance, then there must exist a duty to pay the money. Not that it is necessary that the duty should be evidenced by a bond or covenant, or note or other security. A mortgage may as well be given to secure the payment of a loan, where the whole evidence of the debt rests in the memory of witnesses, as if it could be shown by the most solemn instrument. So an absolute deed may be shown to be a mortgage by showing that it was made as a security for the debt or the performance of the duty, whatever may be the evidence of the debt or duty. In the case just referred to, there was no doubt as to the evidence; the question being as to whether the transaction was a mortgage or a conditional sale, there being an absolute deed executed on one side, and a defeasance in writing made on the other.

In *Wilson vs. Drumrite*, (21 Mo., 325,) it was held, that every conveyance intended as a security for money was a mortgage, and that no agreement of the parties at the time could take away or limit the right of redemption. But in this case also, there was no difficulty as to the facts, the main question being to ascertain the true character of the instrument. (Turner vs. Kerr, 44 Mo., 429.)

The deed is always the best evidence in the first place, of the intention of the parties, and before it can be altered or changed in its legal import, convincing and satisfactory evidence must be adduced for that purpose. The following limitations, laid down in a recent case, express fully and accurately the now prevailing rule and practice.

The burden of proof is upon the party who alleges the absolute deed to be a mortgage. In general, mere declarations must be corroborated by facts; the proof must be clear and convincing, and the terms of the parol defeasance must be established. (Per Strong, J., in *Todd vs. Campbell*, 32 Penn. St., 253.)

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In the case of *Connell vs. Erill*, (4 Blackf., 67,) the complainant brought a bill in equity to redeem certain premises which he had conveyed to the defendant by an absolute deed. The bill set forth that the deed was intended for a mortgage, but the answer expressly denied it. It was held, that though the intention alleged might be proved by parol evidence, such evidence, to be effectual, must be very clear and decisive; and that evidence of defendant's admissions should be received with great caution.

It was further held, that proof of the property having cost the plaintiff about three times as much as the defendant paid for it, and of the plaintiffs having retained possession two years after the conveyance, did not warrant a presumption that the deed was a mortgage against the form of the deed and the answer of the defendant.

And such is now the better doctrine. To reform a solemn deed and turn it into a mortgage by parol evidence, there should be full, clear and unequivocal proof. (*Perry vs. Pearson*, 1 *Humph.*, 431; *Overton vs. Bigelow*, 3 *Yerg.*, 513; *Zone vs. Dickerson*, 10 *Id.*, 373; *Arnold vs. Mattison*, 3 *Rich. Eq.*, 153.)

This court has gone as far as any in holding, that before a deed can be contradicted and the title to land effected, that there should not only be clear and unequivocal evidence, but there should be no room for a reasonable doubt as to the facts relied upon. (*Johnson vs. Quarles*, 46 *Mo.*, 423.)

The authorities are extensively collected in *Ringo vs. Richardson*, (53 *Mo.*, 385,) and the doctrine is emphatically reiterated.

The evidence of the verbal admissions is at best weak, and is always to be received with great caution. Greenleaf pertinently remarks: "The evidence, consisting as it does, in the mere repetition of oral statements is subject to much imperfection and mistake; the party himself either being misinformed or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also, that the witness, by unintentionally altering a

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few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say." (1 Greenl. Ev., §§ 45, 97, 200.)

All the circumstances surrounding the deed, are in favor of its expressing the real contract between the parties.

There is no such inadequacy between the consideration paid and the value of the land, as would afford any presumption against the validity and good faith of the transaction.

The defendant took possession of the land and continued in possession for eleven years, all the while paying taxes on the same and exercising the rights that an owner does with his property. The answer of the defendant and his evidence completely negative the averments in the petition and the testimony of the plaintiff. We have, then, nothing to overcome the circumstances above alluded to, and the presumption in favor of the deed, except the verbal admissions heretofore spoken of made about twelve years before the testimony was given, and which, to my mind, are utterly insufficient to overthrow the deed or in any wise change or alter its character.

I think the judgment should be reversed and the petition dismissed; all the judges concur.

END OF JULY TERM, 1874, AT JEFFERSON CITY.